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IN THE

Supreme Court of the United States

October Term, 1967

No. ~~791~~

MORTON SOBELL,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

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MORTON SOBELL,

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ERRATA SHEET

For Petition for a Writ of Certiorari
Filed November 6, 1967

Page

1 The fifth line under the heading "Opinions Below" should read:

"Court below affirmed on the opinion of the District Court on"

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13 Line 13 under the heading "The Trial" should read:

"6, 1950, United States v. Rosenberg, FRD 521, 523-24"

---

26 Line 18, a quoted excerpt from an affidavit, should read:

"The information in question purported to describe"

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33 Line 2 should read:

"Of the alleged authentication by the AEC and the im-"

Page

35 The second line from the bottom of the page should read:

"Fuchs' confession) and the restraints imposed by the"

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38 On line 2 the record reference omitted should be:

"(A. 424)"

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42 Line 18 should read:

"Any scientific witness at the time of the trial (pp. 35-36),"

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60 Line 17, the third line of the second paragraph should read:

"The petition are alleged on knowledge. Paragraph 63 of the"

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63 Line 2 should read as follows:

"(See p. 33 *supra*)"

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IN THE

Supreme Court of the United States

October Term, 1967

No. ————

MORTON SOBELL,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays for a writ of certiorari to review a judgment and order of the United States Court of Appeals for the Second Circuit which affirmed an order of the United States District Court for the Southern District of New York denying a motion for a hearing pursuant to Title 28, U.S.C., Section 2255.

Opinions Below

The opinion of the district court denying petitioner's motion for a hearing is reported at 264 F.Supp. 579. The opinion was rendered on February 14, 1967 and modified on February 16, 1967 (Appendix 1). The decision of the court below affirmed the opinion of the District Court on June 26, 1967 (Appendix 2), 378 F.2d 674.

Jurisdiction

The judgment of the Court of Appeals was entered on June 26, 1967. On September 14, 1967 the time for filing a petition for a writ of certiorari herein was extended

to and including November 6, 1967 by order of Mr. Justice Harlan. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28 U.S.C. Section 1254 (1).

Questions Presented

Petitioner moved for a hearing pursuant to Title 28, U.S.C., Section 2255 charging that his conviction had been fraudulently contrived, in that the government knowingly used false, perjured and forged evidence, suppressed evidence which would have impeached its case, and that the prosecution falsely characterized and exaggerated the evidence adduced against the defendants.

The prosecution introduced into evidence upon the trial of petitioner and his co-defendants a purported sketch and description of the Nagasaki plutonium bomb which it said was a copy of one that had been transmitted to the Soviet Union, and on the basis of alleged expert testimony by a government employee and the prosecutor's own statements and representations, it caused the court and jury to believe that the alleged original of such data constituted "this nation's most deadly and closely guarded secret weapon" which had been passed to "Soviet agents". Petitioner alleges, on the basis of extrinsic evidence including affidavits of scientists fully acquainted with the facts, that the government knew that the material so created for the trial was garbled, ambiguous and highly incomplete, that it was a false, misleading and essentially meaningless and ignorant conception of the bomb, so incorrect and lacking in qualitative or quantitative information as to be of no service or value to its alleged recipients.

The government also introduced into evidence on the trial as an exhibit a purported photostat of an alleged original hotel registration card to corroborate testimony which the prosecution knew to be false and perjured, to

establish a meeting of certain government witnesses on June 3, 1945 and by these means prove that petitioner and co-defendants were parties to the transmission of classified data to the Soviet Union. The petitioner upon direct and circumstantial evidence *dehors* the record alleges that the exhibit was a forged and after-contrived document and the alleged meeting never took place.

The government has not denied the facts set forth in the moving papers but relies upon the files and records of the case.

Petitioner's motion was denied without a hearing.

The questions presented are:

1. Whether upon the files and records of this case and the moving papers and the standards applicable to a Section 2255 proceeding petitioner's motion should have been denied without a hearing.

2. Where the motion is based upon substantial extrinsic evidence charging the knowing use by the government of false and perjured evidence and suppression of exculpatory evidence, and said extrinsic evidence is thus necessarily in conflict with the files and records of the case, whether it was error for the lower court to ignore or reject the extrinsic evidence without a hearing and to deny the motion upon the files and records of the case.

3. Whether the lower court erred in determining the issues raised upon the affidavits and supporting papers without a hearing.

4. Whether the lower court erred in determining that the evidence charged by petitioner to have been false to the knowledge of the government had no impact in procuring a conviction because such evidence was not essential to prove the crime alleged in the indictment.

5. Where a prosecutor falsely characterizes evidence and resorts to other deceptive devices to obtain a convic-

tion, whether such conduct must be held to have deprived the defendant of a fair trial rendering his conviction void and subject to collateral attack.

6. When the government presents evidence in an area of scientific information of which it has exclusive control, whether it has a constitutional duty to advise the court and the defendant of infirmities and errors in such prosecution evidence, knowledge of which would have been available to the defense in the absence of such exclusive government control.

7. Whether, under the circumstances of this case petitioner has waived the right to collaterally attack his conviction on the ground that the prosecution had obtained it by fraudulent devices.

STATUTES INVOLVED

Title 28, United States Code, Section 2255

§ 2255. Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing

thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. (June 25, 1948, ch. 646, 62 Stat. 967; May 24, 1949, ch. 139, § 114, 63 Stat. 105.)

Prior Proceedings

The petitioner was tried under a superseding indictment returned January 31, 1951 charging him and his co-defendants, Julius and Ethel Rosenberg, and others with having conspired to transmit to the Soviet Union material relating

to the national defense in violation of Title 50 U.S.C. Section 34 (R. 2).*

On April 5, 1951, after trial before a jury, petitioner was sentenced to 30 years imprisonment. His co-defendants, Julius and Ethel Rosenberg, were sentenced to death. On February 25, 1952, the Court of Appeals for the Second Circuit affirmed the judgment of conviction, Judge Frank dissenting as to the petitioner, 195 F. 2d 583.

A petition to this Court for a writ of certiorari was denied on October 13, 1952, Mr. Justice Black noting his opinion that the petition should have been granted. 344 U.S. 838. A petition for rehearing was denied November 17, 1952, Mr. Justice Black adhering to his views. 344 U.S. 889. As Mr. Justice Black later observed in *Rosenberg* v. *United States*, 346 U.S. 273, 301:

> "It is not amiss to point out that this Court has never reviewed this record and has never affirmed the fairness of the trial below."

Since the original conviction and appeal petitioner and his co-defendants have instituted several collateral proceedings pursuant to Rule 35 of the Federal Rules of Criminal Procedure and Section 2255, Title 28, U.S. Code. The instant petition is based upon new facts *dehors* the record and upon issues and grounds relating thereto which never have been presented or litigated in any other post-trial proceeding.

At no time has petitioner or his co-defendants been afforded an evidentiary hearing in any of the post-trial

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* The printed record of the trial is referred to as "R". This record was printed by this Court in 1952. "A" references are to the appellant's appendix on appeal a copy of which has been certified and delivered to this Court. "Op" references are to the opinion of the District Court contained in Appendix 1 of this petition.

proceedings, nor has this Court ever reviewed the denial of a hearing.

The indictment named as additional co-defendants David Greenglass and Anatoli A. Yakovlev. Greenglass pleaded guilty and testified as a government witness. Yakovlev was a Soviet national beyond the jurisdiction of the court. Harry Gold and Ruth Greenglass were named as co-conspirators, and were government witnesses. Max Elitcher was the sole witness who sought to implicate the petitioner as a member of the conspiracy. He testified that Julius Rosenberg sought to engage him in espionage activity and that Sobell thereafter with Rosenberg sought his cooperation to that end. There was no evidence that petitioner had unlawfully possessed or transmitted classified information.

Since this was a conspiracy trial, Sobell was made to bear the burden of all the testimony directed against the Rosenbergs, the overwhelming portion of which was focused upon the alleged theft of the Nagasaki atom bomb by the Rosenbergs through Greenglass and its transmission to the Soviet Union. This was said to be the prime proof of the existence of the conspiracy and the refutation of the defendants' claims and testimony of innocence.

The Present Section 2255 Motion

On May 9, 1966 petitioner moved for a hearing and ultimate relief pursuant to Title 28 U.S.C. Section 2255. That motion was directed to Government Exhibit 16, a photostat of a purported hotel registration card and the testimony of Harry Gold and Ruth and David Greenglass to prove an alleged meeting among them on June 3, 1945 in Albuquerque, New Mexico, allegedly arranged by the Rosenbergs. Shortly prior to the filing of that petition, the petitioner had obtained an order permitting an examination of Government Exhibit 8 and the descriptive testimony of

Greenglass, impounded since the time of trial—the exhibit said to be an accurate and authentic drawing and description of the Nagasaki (plutonium) bomb used in the summer of 1945; and the testimony said to contain information as to its construction, component parts and functions. That was the crucial evidence constituting the alleged theft of the bomb, and it was said to have been transmitted to the Soviet Union.

After Exhibit 8 and the Greenglass testimony had been unsealed and after consultation with scientists who had been intimately involved in the development of the bomb, petitioner found that there were clear grounds based upon the new disclosures entitling him to relief. Leave to amend was sought and ultimately obtained and the amended petition was filed on August 22, 1966.

On July 25, 1966 petitioner successfully moved to amend the petition with an affidavit in support which attached as exhibits the unsealing order of the District Court, a copy of Exhibit 8, and the Greenglass testimony, all in support of the application. The government immediately sought to reseal and impound the Exhibit 8 material stating in an affidavit that the data as demonstrated by the trial record had been considered top secret at the time of the trial. The affidavit further stated that the application was based upon correspondence emanating from the Atomic Energy Commission in support of its application that the material should not be made public (A. 78).

The district judge was thus led to believe that the national security was about to be imperiled, and he felt it necessary therefore to take judicial action upon the mistaken impression of a violation of his order (A. 102-120). Upon the affidavit and the statements of the United States Attorney's office, the court concluded that it was still imperative, 15 years after the trial, to seal and impound for an indefinite time the Exhibit 8 material under strict security conditions, and indeed to impound the affidavit of

petitioner's counsel which demonstrated that the impounded material had been previously publicly disseminated in documents prepared under the aegis or in cooperation with the Atomic Energy Commission.

The government thereafter submitted an order, under the terms of which not only would the Exhibit 8 material be sealed but also the entire 2255 proceedings would be held *in camera* save those portions the government might choose to make public (A. 122-128). When directed to present evidence to prove that the national security would be imperiled by public disclosure, the government, having known all along that its position had no basis in fact and that the AEC had stated the material had been declassified since 1951 and could be publicly disclosed, thereupon abandoned the secrecy melodrama and withdrew its application for *in camera* proceedings and the resealing of the Exhibit 8 material (A. 195).*

From that moment on the government has reversed its position and has stated that the impounded material had none of the attributes given it by the government at the time of trial.

The government, in its answering papers, did not deny any of the factual allegations of the amended petition or those contained in the accompanying affidavits and supporting documents.

Argument was had on September 12, 1966, on petitioner's right to a hearing.

There are two separate but related branches of the present Section 2255 petition. The "atomic" branch added by the August, 1966 amendment, is directed to Government Exhibit 8 and testimony relating thereto, and government claims and representations as to their significance, accuracy and authenticity.

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* These proceedings are found in petitioner's Appendix on Appeal to the lower court (A. 10-207).

The June 3rd branch of the petition is addressed to the perjured testimony of an alleged meeting between Gold and Greenglass and a forged hotel registration card, Exhibit 16, used to corroborate the meeting and to prove involvement of the Rosenbergs in the transmission of classified information to the Soviet Union.

In setting forth the pertinent facts and analysis of the opinion below, each branch of the petition, to the extent possible, is dealt with separately.

Summary of the Atomic Branch of the Motion

The basic thrust of the petition is that the government, in order to prove to the jury the existence of a conspiracy and to obtain a conviction, used deceptive devices to effect a fraud upon the court and jury and defense as well, and thereby created a courtroom atmosphere which could not permit a finding of innocence by the jury.

David Greenglass, who had worked at the Los Alamos project as a machinist, had testified that he had drawn a cross-section of the Nagasaki bomb and prepared a 12 page description of its construction, component parts and operation and delivered them to the Rosenbergs in September of 1945.*

John A. Derry, an employee of the Atomic Energy Commission, was called as an expert by the government to establish that the Greenglass material constituted an authentic and accurate depiction and description of the Nagasaki bomb and its construction and also contained "the principle" of the bomb.

The government, from the inception of the proceedings, even prior to trial, falsely claimed that the information

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* After the dropping of the Nagasaki bomb and the issuance of the Smythe Report, *Atomic Energy for Military Purposes*, September 1, 1945.

allegedly obtained from Greenglass was of transcendent importance, that it contained the most closely guarded vital secrets of the atom bomb.

The arrest of the petitioner and his co-defendants came at a time of national crisis, immediately after the start of the Korean War, a short time after this country had learned of Soviet possession of atomic weaponry and the activities of Klaus Fuchs. This case was said to be the American portion of a giant conspiracy, and the sequence of these events made this a case of national and world-wide interest. All of these factors provided a setting for the prosecution to create the inflammatory atmosphere in which the trial took place.

The government resorted to various devices to deprive petitioner and his co-defendants of a fair trial. We list them in summary form below:

(a) The government disseminated false and misleading information to the mass media prior to and during the trial to the effect that the petitioner and his co-defendants were spies who had delivered the atom bomb to the Soviet Union.

(b) The prosecution falsely imported to the Court and jury and the defense as well that Dr. Urey and Dr. Oppenheimer would be called to testify and would support the prosecution's claims.

(c) After allowing Greenglass to give a purported description of the Nagasaki bomb (Ex. 8) which the prosecution and those associated with it knew to be an essentially meaningless, misleading and misdescribed drawing of the bomb, the prosecution then presented the witness Derry, an employee of the Atomic Energy Commission, falsely holding him out as an expert, and then knowingly permitted him to give false and perjured testimony authenticating and attesting to the accuracy and signifi-

cance and content of Exhibit 8 as described by Greenglass.

(d) To further establish the importance, authenticity and accuracy of the material tendered, the prosecution advised the jury that the material had been reviewed by the Atomic Energy Commission and the Joint Congressional Committee on Atomic Energy (whose representatives were present at the trial) and falsely stated that the information was of such vital importance that it had been only temporarily declassified and would be immediately reclassified by the Commission in the interest of national security.

(e) The prosecutor made false statements and representations as well as grossly exaggerated claims to the court and jury as to the meaning, content and attributes of the Exhibit 8 sketch and description.

(f) The prosecution suppressed by guile or gross negligence facts which would impeach the prosecution case and aid the defense, information which was unavailable to the defense since the subject matter involved was cloaked by a governmental shield of security and control.

It is clear that by these means the melange of misinformation elicited from Greenglass induced the judge and jury to believe that his alleged "information" revealed the mythical secret of the Nagasaki bomb and that Greenglass was in fact a true source of this vital espionage material.

The "validation" of Greenglass in this respect could have sufficed to cause the jury to accept the Greenglass testimony in its entirety and reject the Rosenbergs' testimony which denied the very existence of a conspiracy.

The prosecution's statements to the jury concerning the extreme consequences of the alleged offense, the breaking of the American monopoly on atomic weapons, the peril imposed, giving the Soviet Union the means to destroy this nation were such as to make it virtually impossible for the jury to consider the question of reasonable doubt or to find for the defendants.

The Trial

After the first indictment, the Rosenbergs * moved for an order permitting the examination of the sketches and experiments and other documents referred to in the indictment. The government in opposition argued *inter alia* that the motion would have to be denied in that the data had been

> ". . . classified by the Atomic Energy Commission which means that they are top secret in that they deal with subject matter vital to the defense of the United States and should not be made the subject of disclosure under any conditions."

The motion was denied by the district court on October 6, 1960, *United States* v. *Rosenberg,* 10 FRD 521, 523-24 (Weinfeld, J.), in part, in reliance upon the statement in the affidavit that it would be contrary to the national welfare to make the material available to the defense.

In the days preceding the trial, the government, with concurrent publicity, filed and served a list of witnesses to be called by the government including Dr. J. Robert Oppenheimer and Dr. Harold C. Urey, scientists whose names were known not merely to the worldwide scientific community but to the public at large in connection with their work in the development of the atomic bomb (A. 228).

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* Petitioner was not then named in the indictment, although he was in custody. A similar application was later made by petitioner and denied on the same grounds.

Upon the *voir dire* examination of the jurors, the court, referring to the list of witnesses, stated that they

> ". . . will be called as witnesses for the government in this case" (R. 51, A. 227-229).*

The question posed by the court and the response of the panel removes any question but that the jurors were aware that the charge was that of atomic bomb espionage and theft** (R. 63, 71, 156).

In fact neither Dr. Urey nor Dr. Oppenheimer had ever been asked to appear as witnesses, and they had no knowledge of what they would have been asked (A. 229).***

Yet the prosecution, by these means, as well as by pre-trial publicity, helped to create in the minds of the jurors a preconceived basis for accepting the false claims and testimony to be subsequently tendered.

The Claims, Statements and Representations of the Prosecution.

The Court is *not* here presented with the issue whether transmission of information concerning the atom bomb project at Los Alamos constituted a violation of the Espionage Act. The transmission of information to a foreign country concerning location, personnel, the layout of the

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* The jury panel indicated by their response to questions posed their knowledge of these scientists.

** Dr. Oppenheimer and Dr. Urey figured prominently in the voir dire. One juror asked to be excused because he casually knew a brother of Dr. Oppenheimer and another juror because his daughter had worked with others under Dr. Urey (R. 137, 156).

*** Dr. Oppenheimer shortly before his death confirmed his oral statement to this effect in a letter dated October 25, 1966, stating:

> "No one ever asked me to appear and no one indicated to me what I might be asked were I to appear." (See affidavit of Marshall Perlin in seeking leave of the Court of Appeals to admit petitioner to bail.)

project, Greenglass' machining of lens molds (not used in the bomb) is, for the purpose of this motion, assumed to be a violation of the Espionage Act, even if the information be deemed inconsequential.

The conduct of the prosecution, including the representations made and the attributions given by it to Exhibit 8, the testimony of Greenglass and Derry, is where we find the greatest deception.

In its opening to the jury, the prosecution, after referring to the atom bomb, declared:

> "We will prove that the Rosenbergs devised and put into operation with the aid of Soviet nationals and Soviet agents in this country an elaborate scheme which enabled them to steal through David Greenglass this one weapon that might well hold the key to the survival of this nation and means the peace of the world, the atomic bomb." (A. 221; R. 183)

The nature of the crime was equated with treason (R. 183-184). In order to exaggerate the importance of the alleged Greenglass information, the prosecution sought to equate it with that given by Fuchs when it stated:

> "When one spy after another was caught and confessed, Klaus Fuchs, Harry Gold, David Greenglass, these defendants . . . put into operation an elaborate prearranged scheme . . . to seek refuge behind the iron curtain." (R. 183)

After exhibits 2, 6 and 7, sketches of metallic lens moulds had been introduced into evidence through Greenglass * (not

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* Exhibit 2 is a crude sketch of a two-dimensional flat type lens mold used to form shaped charges, not in fact used in any way in the atomic bomb. Government Exhibit 6 was said to be a lens mold of a high explosive for the purpose of testing. Exhibit 7 is the "mold being used in an experiment" [sic] (R. 462). The misconceptions and misdescription obviously flow from the fact that Greenglass was in fact in no way involved in the utilization of the molds or the explosives formed by them.

(Continued on page 16)

claimed to be the secret of the bomb) the prosecution stated that even this matter had been declassified only for the purposes of the trial and would be reclassified thereafter. As we have subsequently learned, this statement was false. (A. 164, 165, 232; R. 479)

In view of what had transpired, when Exhibit 8 was about to be introduced counsel for the Rosenbergs, accepting and relying on the representations of the prosecution that this data (concededly prepared for the purpose of the trial) was not only accurate and authentic but that its exposure might be of such importance that in 1950 it could "be used to the advantage of a foreign power" (A. 239; R. 500), asked that it be impounded; and he was prepared to concede that it was top secret and not challenge the attributes given to it by the prosecution.

Out of the presence of the jury, the prosecution advised the court and counsel that this entire matter had been discussed and reviewed by his entire staff in conjunction with the Department of Justice and the entire Atomic Energy Commission as well as the Joint Congressional Committee on Atomic Energy, and that:

> "The ultimate resolution was that it was left in my discretion as to how much of this material should be disclosed. . . ." (A. 239-240; R. 501)

Continued from page 15)

Dr. Koski, the only scientist called at the trial, who appeared in the course of the Greenglass testimony, merely used the drawings as a point of departure to explain some of the functions of the actual and ultimate lenses used in the implosion of a plutonium bomb. No evidence as to the actual lenses used in the bomb was ever given at all at the trial. Dr. Koski did not attest to the correctness of the description Greenglass gave as to the use and testing of the product of these lens molds but solely directed his comments to the simplistic drawings themselves. (A. 230-231; R. 470-479.)

After counsel had been unable to work out a satisfactory stipulation, regarding Exhibit 8, it was agreed that the evidence be presented *in camera*. The court then advised the jury:

> "Now, this is a matter of some concern to me personally, that the witness is about to testify to, and the concern I have is as to the method that this testimonly should be handled . . . Mr. Cohn was about to take detailed proof on certain descriptive matters concerning the atom bomb . . . that while it might not be in the best interests of the country was yet a matter that is necessary in the trial of the case and under our democratic form of government." (R. 504)

Mr. Bloch, crediting the government claims and statements now known to have been false, advised the jury and the court that he was concerned that the material would reveal matters which "should not be revealed to the public" and that hence the matter should be dealt with *in camera* (R. 504-505). The prosecution then advised the jury:

> "The character of the proof has been offered, this witness and the preceding one has been the subject of very grave consideration by my colleagues, myself, by agencies of the government including the Department of Justice, the Atomic Energy Commission, and the Joint Congressional Committee on Atomic Energy . . . that matter is of such gravity that the Atomic Energy Commission held hearings, at which I was represented, as did the Joint Congressional Committee, and representatives of the AEC have been in attendance here at the trial, as Your Honor knows, have been in constant consultation with me and my staff on the subject."

And again the prosecution falsely represented:

> "I think I stated before that solely for the purposes of this trial, the AEC had released—had authorized the release of this information so that the court and jury might have it." (R. 505; A. 240-243)

Greenglass then gave his testimony purporting to describe the component parts, operation, principles and secrets of the Nagasaki plutonium bomb (A. 243-247; App. 3).* This testimony was given *in camera* with representatives of the government agencies previously noted present.

In the cross-examination of Greenglass, counsel, while attacking the testimony of the witness's alleged relationship with the Rosenbergs, did not challenge the accuracy and importance of Exhibit 8 and the description given but sought only to establish that it was beyond the competence of Greenglass to give such "complex scientific information", suggesting that he obviously had been coached.

Some days later, just prior to the calling of John A. Derry as an expert as the stand-in for Dr. Oppenheimer and Dr. Urey, the prosecution advised the court:

> "This is a security matter which relates to the atomic bomb. The witness is going to establish the authenticity of the information that Greenglass gave to Rosenberg. I think your Honor will want to take the same precautions that have been taken heretofore, perhaps even more."

And he added that he was going to read to the witness the Greenglass description as well as show him the exhibit and

> ". . . have him establish the authenticity of the cutaway sketch that he gave Rosenberg in September of 1945." (R. 902)

Deferring for the moment the examination of the testimony, we set forth in part the summation by the prosecution as it refers to this portion of the trial. The prosecutor referred to the nature of a conspiracy trial and the

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* Appendix 3 of this petition is the formerly impounded testimony of Greenglass and Exhibit 8. The dot in the center of the drawing is not a marking. The paper was pierced by the compass when the drawing was made.

fact that the actual crime need not be completed but added that in this case it was (R. 1512). He stated:

> "You heard Mr. Derry, who testified in respect of Government Exhibit 8, *the cross section of the atom bomb itself, the Nagasaki bomb*" (R. 1519) (emphasis supplied).

After describing the defendants as "traitorous Americans" who delivered "safeguards to our security into the hands of a power that would wipe us off the face of the earth and destroy its peace" (R. 1518-1519), referring to the atom bomb, he stated:

> "We know that these conspirators stole the most important scientific secrets ever known to mankind from this country and delivered them to the Soviet Union". (R. 1519)

and further:

> "On David's September furlough Rosenberg got from him the cross section of the atom bomb itself and a 12 page description of this vital weapon." (A. 221, R. 1523)

At the conclusion of his summation, lest the jury for one moment forget the gravity of the crime claimed to have been committed, the prosecution stated:

> "These defendants before you are parties to an agreement to spy and steal from their own country, to serve the interests of a foreign power which today seeks to wipe us off the face of the earth. It would use the produce of these defendants, the information received through them, from these traitors, to destroy Americans and the people of the United Nations.
>
> * * *
>
> "No defendants ever stood before the bar of justice less deserving of sympathy than these three." (R. 1535)

The court, in its charge to the jury, stated that the success of the venture, as a matter of law, was the best proof of the conspiracy (R. 1551). The court then noted:

> "In this case the government claims that the venture was successful as to the atom bomb secret". (A. 221-222; R. 1551-1552)

After the jury verdict at the time of sentence the prosecution persisted in making false and grossly exaggerated claims as to the meaning of Government Exhibit 8 in evidence, and the consequences of the defendant's deeds, stating:

> "The secrets they sought and secured were of immeasurable importance and significance . . . in terms of human life, these defendants have affected the lives and perhaps the freedom of whole generations of mankind." (R. 1602)

That the court had been deceived and misled is clearly manifest in the observations made at the time of sentence. Obviously impressed by the remarks of the prosecution, the court, addressing the defendants, noted:

> "But in your case I believe your conduct in putting into the hands of the Russians the A bomb years before our best scientists predicted Russia would perfect the bomb has already caused, in my opinion, the Communist aggression in Korea, with the resultant casualties exceeding 50,000 and who knows but that millions more innocent people may pay the price of your treason. Indeed by your betrayal you undoubtedly have altered the course of history to the disadvantage of our country . . . when they passed what they knew was this nation's most deadly and closely guarded secret weapon to Soviet agents . . . I feel that I must pass such sentence upon the principals in the diabolical conspiracy to destroy this God fearing nation . . . it is not in my power, Julius and Ethel Rosenberg, to forgive you. Only the Lord can find mercy for what you have done" (R. 1615-16)

The government in its brief to the Court of Appeals on the original appeal falsely stated:

> "The descriptive material given by Greenglass to the Rosenbergs at this time was secret and demonstrated with substantial accuracy the principle involved in the 1945 atomic bomb (658, 1325, 1328-20). The sketch furnished by Greenglass was a cross section of the atom bomb (1335, Exhibit 8). With the descriptive material and sketch a scientist could proceed with the actual construction of the bomb itself." (1330; Gvt. Brief, p. 11.)

The Greenglass-Derry Testimony.

Directly after Dr. Koski left the stand, Greenglass was recalled. Only then was Exhibit 8 introduced into evidence as a replica of the sketch of the atom bomb dropped at Nagasaki claimed to have been delivered to the Rosenbergs in September of 1945; and Greenglass said the exhibit was the same as the 1945 drawing (R. 498-499; A. 234-237; Exhibit 8; A. 313 (a)). His description of "the bomb" is set forth in Appendix 3.

Derry, an employee of the AEC, when called to the stand, was given the sketch, and the impounded testimony of Greenglass was read to him *in camera.* From 1944 to 1946 Derry had been a liaison officer between General Groves and the Los Alamos laboratory and thereafter continued to work for the AEC (R. 906-908.) The trial court, in view of the stated purpose for which he was called, advised the jury:

> "The jury will have to decide anyway, but they are entitled on a subject as technical as this and on a subject where there is so little knowledge outside of the technical field to have the help of an expert." (R. 909.)

To further establish the expertise of the witness, additional questions were asked by the court and prosecutor

which elicited the testimony that Derry *knew each and every detail of the construction of the Nagasaki bomb and what went into it and he understood the entire subject matter* (A. 252-253; R. 910).

He thereupon testified that Exhibit 8 as described:

> (a) demonstrated substantially and with substantial accuracy the principle involved in the operation of the 1945 atomic bomb;
>
> (b) was such that in effect any scientist could perceive from the exhibit and testimony the actual construction of the bomb;
>
> (c) was the bomb dropped at Nagasaki, similar to it;
>
> (d) was substantially the bomb as it had been perfected in 1945; and
>
> (e) that he had seen the bomb many times, as well as drawings, and recognized the exhibit (A. 252-255; R. 911-914).

In response to a question as to whether it was a complete description of the cross section of the bomb and the function of the bomb, the court *sua sponte* intervened and in substance stated that there was no claim it was complete in every detail but that it contained "the principle involved". (R. 915-916.)

This brief aside between counsel and the court could hardly have affected the jury's impression that they had been privy to data constituting the theft of the bomb.

The Scientists' Affidavits.

In support of the petition are affidavits of four scientists who were intimately involved with the development of the Nagasaki bomb: Dr. Morrison, Dr. Linschitz, Dr. Urey and

Dr. Christy.* Dr. Morrison and Dr. Linschitz were involved in the actual assembly of the bomb set off at Alamogordo and over Nagasaki. Dr. Christy participated in and was responsible for the implosion design of the atomic bomb. Dr. Urey, Nobel laureate, was one of the original organizers and initiators of the atomic bomb research in 1940 and thereafter played a vital role in the theoretical and engineering problems entailed in obtaining the necessary fissionable material, uranium 235 and plutonium 239.

No one can challenge their knowledge, competence and expertise in the field.

Addressing themselves to the Greenglass exhibit and testimony, the scientists note various misdescriptions, mislabeling and omissions. Greenglass drew a circle and described it as a beryllium plastic sphere used to protect the high explosive from radioactivity. [There was no beryllium plastic sphere nor was beryllium used as a protector of explosives. Beryllium is in fact a neutron source. (A. 343-345.)] The drawing and description omit the *tamper,* uranium 235, which had at least three important functions essential to the operation of the bomb (A. 322). Also omitted is the "initiator" without which the device could not function; and no reference is made to an essential element, polonium (A. 318, 321-322, 343-345). Other constituent elements such as boron and aluminum were similarly omitted. The initiator involved a combination of theoretical and engineering problems both in physics and chemistry. It was one of the most difficult aspects of the bomb problems posed which, in turn, affected the design of the entire weapon.

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* In the course of correspondence with Dr. Oppenheimer substantiating the fact that he had never been asked to testify, he made particular note that he was fully in accord with the affidavit of Dr. Morrison noting: "What Philip Morrison writes is true enough, as one might expect . . . as a statement of a physicist who knew what was going on, it is an acceptable and factual account."

There was also the basic question of the size of the internal cavity of the plutonium sphere which affected the very nature and type of the bomb, its construction and operation. This too was absent from the Greenglass material and could not be even suggested in view of the lack of scale of the drawing, relatively or absolutely (A. 318-321, 325). The area designated high explosive, "H.E.", contained no information whatsoever and, as stated by one of the scientists, it was perhaps "analogous to drawing a cross-section of a new rocket and in a certain rectangular space therein writing 'fuel and engine'" (A. 317, 323).* As an added fillip we have Greenglass' false statement that the bomb was dropped by parachute. Two other entire functioning systems of the bomb device are not even touched upon (A. 341).

Dr. Morrison, noting that the Greenglass cross section and its description were grossly incorrect and incomplete, stated it gave "a false depiction of what is purported to be the cross section of the atom bomb", then pointed out several of the glaring omissions, misdescriptions and the lack of comprehension evidenced by the maker of the described sketch. He finds factually not only that it lacks any "correct quantitative information", but that it is also "qualitatively incorrect and misleading" (A. 342, 346). These statements of fact are in direct conflict with the testimony of Derry, who Dr. Morrison states categorically

> ". . . had neither the scientific background to equip him with knowledge of the design and construction of the atom bomb nor was he closely associated with the technical aspects of the project" (A. 346),

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* No indication is given as to the chemical composition of the explosive, whether one or more were involved, their structure, the question of lens interfaces and construction. Thus the information given "would not enable anyone to build even a flat lens, let alone many large three-dimensional ones." The resolution of this problem, the mathematics involved, the "cut and try method" that had to be followed is enough to indicate the scope of the problem, none of which is even suggested in the Greenglass material. (A. 324, 329)

further evidenced by his failure to correct or disassociate himself from the gross errors in the Greenglass testimony and sketch (A. 347-348). The affidavit denies the Derry testimony that he knew each and every detail of the construction of the bomb, what went into it, and that he understood the entire subject matter (A. 252-253; R. 910).

In response to Derry's claim that one could perceive from the sketch the construction and he had seen the bomb and sketches thereof many times, Dr. Morrison noted:

> ". . . he ought to have added 'and it did not look like that'. . . . In reality an inside view [of the bomb] cannot be obtained. It is doubtful that such a sketch was to be found anywhere on the project . . ." (A. 347).

Factually finding no foundation for the Derry testimony to the effect that the material was such that "one could perceive the actual construction of the bomb" and that it was the bomb that was dropped at Nagasaki or similar to it, Dr. Morrison stated that the only correct and honest answer which could be given by one having knowledge would be:

> "Say rather it is a caricature of that bomb" (A. 348).

Based upon these clear and unequivocal facts, one can only conclude that either Derry was lying as to his expertise or he was, with knowledge, falsely authenticating the Greenglass material and falsely attesting to its accuracy and the information it conveyed.

Dr. Linschitz, similarly analyzing the Greenglass evidence, points out several of its gross errors and major omissions, and finds the material presented to be a "garbled, ambiguous and highly incomplete description" of the Nagasaki bomb. He noted the lack of the essential principles involved, and referred to some of the many vital principles underlying the development of the bomb not at

all reflected in the questioned material which Derry "authenticated" as "accurate" (A. 317-321).

After stating some of the numerous primary principles involved, Dr. Linschitz directed himself to one basic problem, the principle underlying the initiation and actual detonation mechanism which determined the very nature of the entire bomb design, its components and construction. All of this was dependent upon the size of the plutonium's internal cavity as well as the physical state of the element, which would determine whether the point of criticality was reached by geometric change of the form of the plutonium or by some alteration of its density. Exhibit 8 and its description gave no information whatsoever in this regard. In pointing out this one crucial omission, Dr. Linschitz makes clear that he does not thereby import that it was lacking or defective merely in this one respect. This is evidenced in his concluding statement:

> "The information in question to describe the construction of a plutonium bomb was too incomplete, ambiguous and even incorrect to be of any service or value to the Russians in shortening the time required to develop their nuclear bombs" (A. 338).

In so stating he was also directing his comments to the claims of the prosecution concerning the nature and significance of the information allegedly transmitted, noting:

> "I have also considered various statements in the record of the trial regarding this material and its possible value in assisting the development and construction of a Russian implosion bomb" (A. 316).

It is in the factual sense, not the legal, that he dealt with the atttributes, meaning and value given the evidence by the prosecution throughout the trial, and how this caused the experienced trial judge to accept the claim of the "theft of the bomb" and the assumed consequences.

All of these affidavits read together not only attest to the lack of authenticity, let alone accuracy, of the Exhibit 8 information, but also make clear that only a scientist who already knew of the nature, construction and operation of the Nagasaki bomb could derive any meaning from the sketch by imposing thereon his prior knowledge, deleting the errors and filling in the omissions.

The basic theory of the possibilities of obtaining a fast neutron fission chain reaction was publicly known in the international scientific community and was discussed in various mass media as early as 1939 and 1940. The basic question then unresolved was whether the hypothesis or possibility was in fact true and achievable. This was answered and made known to the world in August 1945, when the Hiroshima and Nagasaki bombs were set off.

That the Nagasaki bomb was a plutonium bomb was announced to the world in August of 1945; that beryllium was a source of neutrons was a fact known almost contemporaneously with the scientific finding of the existence of neutrons, which long precedes the beginning of World War II. Any scientist considering the method of detonating an atomic bomb would, at the very threshold consider the gun method, implosion or some autocatalytic means. Exhibit 8 merely describes an unscaled area of the bomb said to contain a high explosive [sic]. The phrase "high explosive lens" itself is a vague, uninformative phrase, concealing a multitude of theoretical and practical questions as to the type, composition and structure which can only be resolved pragmatically and are obviously not contained in any of the Greenglass testimony (A. 323-324).

The listing of some of the omissions, mislabelling and misconceptions set forth above does not even touch upon innumerable other scientific theoretical problems and their means of application necessary to develop the various systems of the bomb and the actual construction of the

bomb. The information required to state "principles" is so lacking in Exhibit 8 and its description as to make "discussion of 'principle' superfluous" (A. 321-322).

Perhaps the most fundamental false assumption and claim, both contained in the Derry testimony and in the statements of the prosecution, which obviously misled the jury, was that there was "a secret", "a principle" and "a key formula" for the construction of the bomb. The jury was told it had been given the secret, the key to the principle and the construction of the bomb in the Exhibit 8 material. But Dr. Linchitz states:

> "The layman still clings to the misconception that there is *a* 'secret' or key 'formula' for the construction of an atomic bomb. This notion was even more obsessively held at the time of the Rosenberg-Sobell trial, even by the defense, and the record shows important statements by the prosecution and presiding judge which only served to reinforce this dangerously false impression" (A. 333-334).

It is in light of all these facts that the statements of the prosecution as well as the authentication of the Greenglass testimony by Derry must be considered in evaluating whether a showing has been made mandating that petitioner be given a hearing.

The Opinion of the District Court on the Atomic Branch of the Petition.

In deciding to dismiss the petition, the lower court misread or disregarded factually supported allegations of the petition and the substantial fact evidence found in the affidavits submitted in support.

The petitioner is entitled to a hearing to substantiate the charges. The district court had the duty to find the issues of fact, rather than determine issues *ex parte*. It well may be that the district court's lack of understanding of the thrust of the petition arose out of the esoteric and

technical nature of the scientific fact questions involved, which particularly cry out for a hearing to permit resolution and establish effective communication between the law and the scientist.

The lower court did not face and deal with the false statements, claims and representations of the prosecution, and the impact they had in causing the jury to accept, in that light, the testimony of Greenglass and Derry, and thus to convict petitioner and his co-defendants. As a concomitant of this error, the court extracted from its consideration of the case the prosecution's claim that the defendants had successfully stolen the atom bomb, and our most vital secrets and premised its denial of a hearing upon the theory that the transmission of information, however fragile, marginal or insignificant, nevertheless as a matter of law would have constituted a violation of the Espionage Act. The court concluded that defendant would have been convicted in any event and finds as a fact that the jury was in no way misled.

The lower court's summary of the trial testimony was erroneous and inaccurate in a number of areas. Much is made of the fact that Greenglass was "assigned to a machine shop concerned with high explosives" (Op. 5). But Greenglass only machined metallic lens molds. He was not involved with their use in forming a lens or the explosives shaped thereby. He was physically far removed from the area where the lenses were made and tested (and even those were lenses not used in the bomb) (A. 257; R. 471, 625, 626).

The lower court further erred in concluding that Dr. Koski had testified as to the accuracy of Greenglass' descriptions of the experiments and their details. Dr. Koski testified only as to drawings (other than Exhibit 8) and he did not verify or authenticate the Greenglass testimony describing Exhibits 6 and 7 (Op. 6).

In summarizing the testimony of Derry, the court failed to note that the government had called him for the declared purpose of establishing the authenticity of Exhibit 8 and the description given; that he was characterized by the court to the jury as an expert qualified to do so. Derry stated not only that he "understood the entire subject matter" (Op. 8), but also that he knew "every detail of the construction of that weapon" (A. 252; R. 910). That testimony was flatly and factually refuted by the Morrison affidavit (A. 252-253, 346-348; R. 910).

At no time in the opinion does the lower court juxtapose the statements made by Derry with the statements of fact of the scientists directed to his testimony. The court deals with these fact issues as varying "opinions" between two experts while the evidence presented establishes factually that Derry was either not an expert or was perjuring himself.

In its trial summary the district court made no reference to the numerous statements and representations made by the prosecution itself. This is inexplicable in that the petition plainly points to these statements as a major part of the deception practiced upon the jury and trial court (A. 220-224, 232-233, 239-240, 271-272). The failure of the court below to weigh or discuss these aspects of the petition resulted in an opinion premised upon a trial completely different from the one held.

We deal below with some specific errors in the opinion shown by pertinent record references.

Opinion.

> The lower court in summarizing the petition asserted that it faults Greenglass "because Exhibit 8 and his exposition of the descriptive material failed to measure up to a scientific standard of perfection as to accuracy, precision and detail" (Op. 12); that the scientists supporting the position "do not grade

> Greenglass' drawing and his descriptive testimony 100% . . . judged by their scientific and engineering standards" (Op. 15). The court noted that neither Greenglass nor the government had claimed that the material was "definitive" (Op. 14); that it was admittedly "not to scale", "a schematic sketch, not a blueprint" (Op. 14); and the jury could not have been "misled as to what it represented" (Op. 14).

The opinion thus portrays the trial as one in which the petitioner and his co-defendants had been charged with having transferred marginal, although classified, material to the Soviet Union.

In reality the petition attacks the government and Derry for falsely claiming that Greenglass' Exhibit 8 and testimony had attributes of accuracy and authenticity which, as a matter of fact, and not opinion, were wholly lacking. The thrust of the petition is particularly against the role of a prosecutor in using the Derry testimony in conjunction with that of Greenglass and enlarging upon the false testimony; falsely importing that the claims had been approved by Dr. Oppenheimer, Dr. Urey and others; that the AEC and the Joint Congressional Committee on Atomic Energy, whose representatives were present at the trial, were in full accord. The prosecution's assertions were more far-reaching than the lower court seems to have realized. Greenglass did testify in response to a series of obvious leading questions posed by the prosecution that it was "a cross section of the atomic bomb" (A. 236-243), the phrase "the atomic bomb" being used again and again, along with a 12-page description of "vital secret data" (A. 244). No piddling hunt for isolated disparaging words can erase that falsehood (Op. 14, fn. 31, 32). The impact of its falsity was intensified by the prosecution's statements that this information constituted the theft of "this one weapon", "the most important weapon ever known to mankind" (A. 221; R. 183); that Derry authenticated "the cross section of the atom bomb itself,

the Nagasaki bomb" (R. 1519); that the defendants had stolen "the most important scientific secrets ever known to mankind" (R. 1519) by delivering "a twelve page decription of this vital weapon" (A. 221; R. 1523), which could "wipe us off the face of the earth". The trial judge described the government's claim of the crime as to the theft of "the atom bomb secret". (See the comments of the court on sentencing (R. 1613-1615.)

Opinion.

> The lower court conceived the direction as well as the content of the scientists' affidavits to be expression of opinion. (Op. 13)

The scientists, as a point of departure, first analyzed the Greenglass material to place them in a position in this context to deal with the testimony of Derry and the claims and representations of the prosecution. It is then that they set forth the pertinent facts in connection with the development of the bomb to factually demonstrate that the Derry testimony and the prosecution's claims had no foundation in fact, were scientifically false, and that the diagram and description were essentially meaningless except to one who already knew the construction and operation of the bomb.

Opinion.

> The court concludes that what the scientists say is not "relevant" because Greenglass' "role was to get classified information—to get what he could" (Op. 14), and since the drawing was admittedly not to scale "a schematic sketch, not a blueprint, there is no warrant for a contention that the jury or defense counsel were misled as to what it represented". (Op. 14)

Yet if the trial court was misled, the false testimony and statements of the prosecution obviously had a greater impact upon the jury than the lower court now opines. The Greenglass material must be considered in the context

of the Derry testimony, the prosecution claims, the impact upon the alleged authentication by the AEC and the imputed approval by leading scientists. The distinction between a "blueprint" (the lower court's term, not ours) and a drawing with the value and attributes claimed by the government and Derry, was insignificant to a lay jury.

Opinion.

> The lower court says that "the issue of secrecy and value of the information to the Soviet Union was determined upon the merits in the first Section 2255 motion". (Op. 13)

The challenge there was to the power of the government to classify as "secret" activities it was engaged in at Los Alamos in developing the bomb. The value of Exhibit 8 and its description could not be an issue in that it was not before the court or seen by the scientists. In the first motion the court held that it need not and did not reach the question of scientific value but that the data was properly classified and thus encompassed by the statute.

That petition was primarily based upon the claim of knowing use of perjured testimony when Greenglass testified that he had obtained no outside aid or technical data in drawing Exhibit 8 and giving the description and explanation. A similar attack was based upon this testimony as it related to Exhibits 2, 6 and 7. The crux of the matter is that the defense then believed the government's false representations as to the accuracy and authenticity of the impounded Exhibit 8 material and it was on this premise that Greenglass' testimony was said to be false. In the petition to this Court (*Rosenberg* v. *United States*, October Term, 1952 Docket No. 687, pp. 13-14, 345 U.S. 965) it was stated:

> "Derry . . . stated that the exhibit was a substantially accurate representation of the cross-section of the Nagasaki atom bomb and affirmed, as well, the substantial accuracy of the oral explanation (C.R.:

> 908-15) . . . It is patent that Greenglass' testimony was false . . . as to his preparation of Exhibit 8 and its testimonial explanation from memory alone and without any outside aid."

Opinion.

> The lower court states that the scientists merely "disagreed with Derry's opinion" and that different opinions do not "establish [the] falsity" of Derry's testimony. (Op. 15)

But Derry falsely claimed a scientific knowledge which he did not have and such knowledge was a prerequisite for the kind of testimony he was asked to give and gave. He has subsequently admitted that he was "unaware of how he had been chosen to testify . . . there were plenty of people at Los Alamos who knew much more than he . . . he was not a scientist but a construction man, and didn't know much physics" (A. 421). (Also see the affidavit of Dr. Morrison (A. 436-48).)

Derry testified that Exhibit 8 was authentic and accurate and contained the undefined single "principle" of the construction of the bomb. That testimony was false in fact. The scientists have sworn that this "caricature" of a bomb (A. 438) omitted at least two vital component parts (A. 343-44), was "garbled and highly incomplete" (A. 317), "naive", "bizarre" (A. 318); that it "leaves a basic ambiguity" and omits "essential information needed to make clear the 'internal principle'" (A. 321); that it contains "no information regarding lens construction" and that the information given is essentially worthless (A. 328-331). These affidavits raise issues of fact, not a "mere difference of opinion".

Opinion.

> Credibility was for the jury, referring to Derry's "opinion". (A. 454)

The court overlooks the fact that the falsity of Exhibit 8 was not known at the trial, and the judge, jury and defense relied on the government in accepting Derry's false qualifications as an expert.

Opinion.

> The court finds that petitioner's accusation that the government falsely presented Derry as an expert and adduced by him false and inaccurate testimony "dissolves when considered against the indictment charged" because "the conspiracy was not limited to atomic bomb information." (Op. 16)

This is a non-sequitur. And the court once again has overlooked and ignored the basic claims of the government in its statement to the court and jury in opening, in summation, and at the time of sentencing, that the defendants were successful "atom bomb spies". It cannot be said as a matter of law that without these claims by the prosecution and the falsehoods of Derry the jury would nevertheless have found the defendants guilty. The conspiracy charged in the indictment is one thing; the substantive crime falsely proved on the trial was used to produce the conviction and prove the conspiracy charge, and compel a verdict of guilty.

Opinion.

> The court states that the petitioner had been "free to call witnesses to contradict Derry . . . no action of the government prevented him from doing so". (Op. 16-17)

If the government commits a fraud to obtain a conviction it cannot be defended on that ground. Moreover, the circumstances existent at the time of the trial (the Russian development of the bomb, the Korean War, the Fuchs confession) and the restraints imposed upon by the Atomic Energy Act, made it virtually impossible to reach

any atomic scientists able or willing to testify. This was particularly so in light of the government's falsely-stated intention of calling the most prominent scientists as prosecution witnesses (A. 228-29). The legal considerations and the facts of scientific life at the time would have required any scientist so intrepid as to offer to testify for the defendants to clear his testimony in advance with the AEC, the agency seemingly attesting to the authenticity of the material. No scientist was obtainable, and that is a fact.

Opinion.

> The lower court says the scientists' opinions of Derry's testimony were "measured by their standard of scientific perfection" and it is in this light that Exhibit 8 and the Greenglass description were found to be "both qualitatively and quantitatively incorrect and misleading". The lower court finds that the issue at the trial was whether the material demonstrated "substantially and with substantial accuracy the principle involved in the operation" of the bomb" and that one can "perceive what the actual construction of the bomb was" rather than "accuracy and completeness as a description of the plutonium bomb". (Op. 17)

Once again the lower court obviously misread or misconceived the contents and meaning of the scientists' affidavits which only serve to re-enforce the fact that these issues cannot be resolved without an evidentiary hearing. The scientists did not use "a standard of perfection" They directed themselves to the very same questions in answer to which Derry had falsely testified that Exhibit 8 contained "the principle" of the operation of the bomb and would permit and enable a scientist to construct the bomb from the Greenglass misinformation. As stated by Dr. Christy, it would convey only "the germ of the ideas involved" to "one already familiar with the bomb design" (A. 424-425). The entire content of the affidavits of the

scientists overwhelmingly establish factually the falsity of the Derry statement that the Exhibit 8 data gave "with substantial accuracy the principle of the operation of the 1945 atomic bomb" and the "secret of the atom bomb". They state there was not a single secret or principle or key formula underlying the construction and operation of the bomb except one—that it worked.

Opinion.

> The opinion notes that Exhibit 8 was admittedly "not to scale", yet the scientists "condemn it and Derry's testimony because it was not so drawn." (Op. 17-18)

The scientists state as a matter of fact that the relative dimensions were so critical that if not drawn to scale the sketch and description could not possibly have any value or any of the attributes given the material (A. 319-21). Of even greater importance is the fact that the government knew that without the "scale" factor their representations as to the meaning of the material was in truth a grand hoax. Similarly, if Derry was the expert he claimed to be he would have known this to be a fact.

Opinion.

> The lower court refers to the statement of Dr. Christy that "the sketch presented is the kind of diagram I would use to explain the ideas involved in the bomb." (Op. 19)

But the court ignores his statement that he finds himself "in general and detailed agreement" with the affidavit of Dr. Morrison, and this would apply not merely to the sketch but as to Derry's expertise and his testimony. A pedagogical device or a sketch as such has no meaning particularly as to the complex scientific data here involved unless a person having the full knowledge of the subject matter is explaining and describing it and giving "a cor-

rect verbal description and explanation of components and functions".

Opinion.

> The court quotes language in the affidavit of Dr. Linschitz (A. 325) and asserts that "it would not have been difficult for a scientist to fill in the gaps—hardly different from Derry's testimony quoted above" (Op. 19-20).

It is unfair to petitioner to extract from a lengthy, informed and crushing analysis of the Exhibit 8 material a single phrase out of context and to disregard the balance of the Linschitz affidavit. This may be effective strategy on cross-examination but it is not the standard to be used to determine whether petitioner is entitled to a hearing.

Dr. Linschitz, after dealing with one "basic 'principle' " and showing its complete absence from the Greenglass drawing and description, notes that "a research expert who has devoted hard years of work and worry to the problem" can "correct and fill in the gaps subconsciously" based upon his intimate knowledge of the subject matter. This does not import that any scientist from the drawing as described could "fill in the gaps". The court below misread the affidavit, which in fact is different from and in conflict with Derry's testimony. The lower court fails to allude to the statements by Dr. Linschitz in analyzing the material (A. 317, 318, 323, 324). The test was not stated to be one of "scientific perfection"; but that the alleged Greenglass information was

> "too incomplete, ambiguous and even incorrect to be of any service or value . . . . " (A. 338)

Opinion.

> Dr. Morrison's affidavit is said by the lower court to be based upon "a standard of scientific perfection and detail and not upon the evidence given at the trial." (Op. 20)

Unless the lower court did not understand the affidavit, it is difficult to find the basis for the court's conclusion, for Dr. Morrison specifically adverted to the testimony of Derry and Greenglass (A. 346). His affidavit flatly contradicts the testimony of Derry (A. 342-348).

Opinion.

> The opinion goes on to say that both petitioner and the scientists maintain that the gravamen of the complaint is that Greenglass failed to achieve perfection or provide sketches and specifications required for a large scale production and construction of the atomic bomb (Op. 20-21).

The lower court has set up another straw man and promptly knocked it down. Nowhere does the petitioner claim directly or indirectly that the government was required to produce such evidence or that the infirmity in the government's case was of such a nature. We must again refer to the government's statements as well as the testimony of Derry. The lower court seems to have ignored that the prosecutor played an important role in this case and his statements can be said with a reasonable degree of certainty to have had some impact upon the jury. These statements must be considered, particularly when there is such a substantial showing that they were false, grossly exaggerated and highly inflammatory.

Opinion.

> The lower court under part "Fourth" of its opinion claims that the petition "rests upon a distortion of the record, a disregard of the substance of the testimony, reference to matters out of context, and others not presented to or not occurring in the presence of the jury . . ." (Op. 21-22)

This unwarranted disparagement is supported by no record reference and is assumedly an introductory comment to the details that follow.

Opinion.

> The court completed its prior comments by referring to "impermissible inferences". In the footnote the court gives a "prime example of petitioner's manner of reading the record" and petitioner's misuse of the word "secret" citing the discussion before the bench concerning a proposed stipulation that the Exhibit 8 material be deemed secret and confidential under the terms of the Espionage Act. (Op. 21-22)

But the lower court continues to ignore the plain and unequivocal statements of the government as to the attributes of the information alleged to have been passed, statements made to the jury, describing Exhibit 8 again and again and again as the secret which enabled the Soviet Union to construct the atom bomb and threaten our country with extermination. See pages 16-22, *supra,* and A. 221; R. 183, 504-505, R. 1519, 1535, 1602.

Opinion.

> In the same footnote the opinion goes on to justify the government's claim that Exhibit 8 "was a sketch of the very bomb itself" as proper no matter how inaccurate, incomplete the sketch. The court says the phrase was simply ordinary language. (Op. 22)

Here the court speculates and then concludes that the jury could not have been misled by the persistent references to Exhibit 8 as a sketch or cross section of the atom bomb we dropped on Nagasaki or as "the bomb itself." This is an impermissible inference on the part of the court who might have taken judicial notice of the definition of the word "itself" in Webster's New International Dictionary, Second Edition:

> "1. An emphasized form of the pronoun for the third person neuter;—sometimes two words *its self.* Its uses are
>
> a. *For emphasis;* as he was innocence *itself;* the text *itself* is well edited. . . The house looked *itself* again . . .

2. *Ir. exactly; indeed; in fact; . . .*" (emphasis supplied)

It is clear that it was the government's purpose in using the word, "itself" to establish in the eyes of the jury that it was the bomb "exactly, indeed, in fact", the Nagasaki bomb.

Opinion.

> The court faults the petition for the assertion that defense counsel were intimidated in their action by references to and the presence of representatives of the Atomic Energy Commission. (Op. 22)

The petition does state that the climate of opinion inflamed by the government by out-of-court publicity had an inhibitory impact upon the defense (A. 309). The petition did *not* allege that the presence of the AEC representatives intimidated defense counsel, but rather that their presence was used by the prosecution to give credence to false testimony and statements by the prosecution (A. 214, 268). It was the jury that may have been intimidated when the prosecution adverted to the fact that the evidence to be adduced had been the "subject of very grave consideration by my colleagues . . . by agencies of the government—the Atomic Energy Commission and the Joint Congressional Committee on Atomic Energy." (R. 505)

Opinion.

> The opinion states that "petitioner professes to see a conspiracy to suppress evidence and to mislead his counsel in the failure to call . . ." Dr. Oppenheimer, Dr. Urey and Dr. Kistiakowski although they were included in the list of witnesses. The opinion finds that no representation was made as to what these witnesses would say and hence the jury could not have been misled. (Op. 23-24)

The lower court fails to recognize the essence of the government's misconduct and that is to be found in its

deceptively listing as witnesses scientists it had never approached and whom it had no intention to call. To suggest, particularly in light of other prosecution activity and statements, that this could not have had impact upon the jury is at best an unfounded speculation which the lower court was not permitted to make in determining petitioner's right to a hearing. The prosecution in fact misused these names for the very purpose of imparting to the jury the assumption that the named witnesses supported the government's claim and Derry's testimony. The lower court could not deal with these elements of the fraud in isolation.

Opinion.

> The lower court concludes that the failure of the government to call the named witnesses was of no moment in that the defendants could have compelled their appearance by subpoena. (Op. 24)

We have previously discussed the problems of calling any scientific witness at the time of the trial (pp. 36-37, *supra*). To suggest the defense counsel would call as a witness a person whom the government has openly claimed as its own, who had allegedly been consulted with and who was prepared to support the government's contentions, lacks any element of reality.

Opinion.

> The trial court could not have been misled "as to the importance of the atomic information insofar as the petitioner is concerned" in that the court found that petitioner was not involved in the "atomic bomb project". (Op. 25)

The court conspicuously makes no mention of the impact of the claimed importance of the atomic information upon the jury which may well have been the basis of their finding that a conspiracy existed. Moreover, the emotional considerations and the misconceived premises upon which

the court imposed the death sentence upon the Rosenbergs cannot be said to have had no impact upon the court in imposing on petitioner the maximum sentence of thirty years and gratuitously advising that petitioner not be released on parole.

Opinion.

> The lower court insists that the availabilty of the impounded material was always known by petitioner and his counsel and further asserts that this was reflected both in the impounded testimony and in the public record. (Op. 26)

This is not a motion for a new trial on the ground of newly discovered evidence. If a fraud has been committed the conviction cannot stand. Petitioner has not been withholding his trump card while spending seventeen years in prison. The printed record *does not* indicate the availability of the impounded transcript and exhibit. The record reference (R. 903) adverted to by the lower court referred to its availability *solely* for the purpose of the examination of Derry. Why the trial court and the prosecution impounded that portion of the transcript which merely said that it will be available for any subsequent proceeding is hard to fathom. To expect petitioner to have recall of that single sentence out of more than two thousand pages of testimony given while under the stress of this emotion-packed trial after which he was soon carted off to Alcatraz is an extremely unjust as well as unwarranted presumption. In fact, neither petitioner nor his co-defendants had ever seen the Exhibit 8 (R. 1097).

Exhibit 16 and the June 3, 1945 Branch of the Petition

In addition to fabricating authenticity and importance of information allegedly obtained by Greenglass, the government sought to establish that the conspiracy had been successful by proving there had been actual transmission of in-

formation to the Soviet Union, and that the Rosenbergs, hence petitioner, were part of the Gold-Fuchs-Yakovlev spy ring. To establish this "linkage" the government focused upon an alleged meeting between Gold and Greenglass on June 3, 1945 in Albuquerque, New Mexico where the link was said to have been established (A. 273-274, 277-278). The government corroborated this meeting by Exhibit 16, an alleged photostat of a purported Hotel Hilton registration card bearing the June 3, 1945 date on its face.

Gold and the card were the sole corroboration of the essential testimony of David and Ruth Greenglass. No one other than the Greenglasses stated that they had given information to the Rosenbergs and no one but Gold testified that it had been transmitted to the Soviet Union.

To establish this aspect of the case the government:

(a) knowingly caused and permitted Gold and the Greenglasses to give perjured testimony to the effect that there had been a meeting between them arranged by the Rosenbergs on June 3, 1945 in Albuquerque, New Mexico when in fact there had been none;

(b) introduced into evidence Exhibit 16, a purported photostat of an alleged original of a June 3, 1945 registration card of the Hotel Hilton, Albuquerque, New Mexico when in fact the alleged original and photostat were to the government's knowledge, forged, after-contrived documents, and Harry Gold did not stay or register at the Hotel Hilton on June 3, 1945;

(c) having obtained the admission of Exhibit 16, a photostat, into evidence, the government, to prevent subsequent exposure of the fraud, disposed of the alleged original in August, 1951, knowing that by reason of such action it would not be subject to scrutiny in the event of a re-trial of the case, if indeed any original card existed.

(d) knowingly suppressed and continued to suppress evidence known to it but not known to the peti-

tioner and his counsel which would have impeached and refuted the testimony against petitioner and his co-defendants (A. 215-16).

The Trial Record

Gold testified that in May of 1945 he met with Yakovlev, a Soviet national, in preparation for a meeting with Klaus Fuchs on June 2, 1945, and further:

i. was given an additional chore characterized by Yakovlev as "very vital . . . extremely important business" (R. 821);

ii. was replacing a woman courier * (R. 821);

iii. was given the name and address of Greenglass on an onion skin paper and told the recognition phrase was "I come from Julius" (A. 278; R. 822);

iv. was then given a cut piece of cardboard from a jello box as an additional recognition signal (A. 279; R. 822);

v. after seeing Fuchs in Sante Fe on June 2, 1945 and visiting the Greenglass apartment when they were not then at home (A. 822-23), he found a place to sleep in a hallway of a rooming house (A. 279; R. 825);

vi. upon arising and getting dressed on Sunday, June 3, 1945 he first went to the Hotel Hilton and registered and then went to the Greenglass residence, arriving at approximately 8:30 A.M. (A. 279; R. 825);

vii. gave the recognition signal "I come from Julius" and then the cardboard pieces were brought out and matched (R. 825);

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* The Greenglasses had testified that an arrangement for a meeting in New Mexico had been made in January of 1945. The courier was said to be Ann Sidorovich who was allegedly present at the time of the arrangements. Petitioner recently learned that she had denied this testimony before the indicting Grand Jury. She was never indicted and her name as well as that of her husband appeared in the government's list of witnesses.

viii. after conversation he left and returned and was given an envelope by Greenglass (R. 827) and advised by Greenglass that Gold could get in touch with him if he wished by calling his brother-in-law, Julius, whose telephone number he also gave to Gold (A. 280; R. 827);

ix. he thereafter referred to two subsequent meetings with Yakovlev in June, 1945 (R. 829) and on the second occasion testified that Yakovlev stated that the information from Greenglass "was extremely excellent and very valuable" (A. 299; R. 831).

A major portion of Gold's testimony related to his dealings with Fuchs from 1944 to 1946. In the course of his testimony he referred to a second meeting in New Mexico with Fuchs on September 19, 1945 but made no reference to registering at the Hotel Hilton on September 19, 1945 nor was a registration card to corroborate the meeting tendered at the trial.

After Gold had left the stand without any cross-examination, and after two intervening witnesses, the prosecutor approached the bench and stated:

> "I now have some testimony which it is possible that there will be a stipulation on: the fact of the registration of Harry Gold at the Hotel Hilton on June 3rd." (A. 280-281; R. 867)

He stated that he had the original of the card on the way "together with a witness if required" * (A. 282; R. 867). He requested that Mr. Bloch stipulate as to the records rather than insist upon "strict technical proof". Mr. Bloch did so and the document was admitted into evidence

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* The name of the witness was not designated although the clerk, Anna Kinderknecht, who purportedly filled out the registration card in 1945 and was still working at the hotel in 1951, was not on the list of witnesses. The only person associated with the hotel on the list of witnesses was Fletcher Brumit, who had not been connected with the hotel in 1945.

as a record "made in the regular course of business . . ." (R. 869).

The linkage testimony was heavily relied upon by the prosecution in its summation: the "history of the Jello box side, the greetings from Julius . . . furnished the absolute corroboration of the testimony of the Greenglasses, forged the necessary link in the chain" (R. 1521); the veracity of the witnesses was said to be "established by documentary evidence . . . the registration card from the Hotel Hilton . . . which shows that he [Gold] was registered there on June 3, 1945," and each of the items of connection contained in the Gold testimony was specifically referred to (R. 1522-23), including the participation of Fuchs in the one grand conspiracy.

The court in its charge to the jury recognized the importance of the card and the June 3rd meeting to the prosecution's case, adverted to the same testimony and stated that by these means "the government attempted to show the *link* with the Russians . . ." (R. 1557) (see A. 283-286).

Petitioner does not claim that Fuchs and Gold never met, nor does he acknowledge that they ever did, or that Gold did or did not meet Fuchs on September 19, 1945. The petition affirmatively shows that Gold never met Greenglass on June 3, 1945 and did not register at the Hotel Hilton on June 3, 1945, after allegedly seeing Fuchs in Sante Fe on June 2, 1945.

Fuchs' description of his courier—(if there was only one)—was not that of Gold, and he never "identified" Gold even after Gold had confessed his involvement in espionage activities (A. 288-289). In fact this was essentially conceded by the FBI at the time of the sentencing of Gold.

Exhibit 16

The formal arrest was made only after the FBI is said to have obtained the purported original of the Hotel

Hilton registration card dated September 19, 1945 bearing Gold's name (A. 288-289). The photostat of the September 19th card shows the initials of several FBI agents inscribed on the back along with the date of acquisition, May 23, 1950 (A. 316-362). It is not disputed that the FBI did send its agents to obtain all documents or records to establish Gold's presence in or about Sante Fe and Albuquerque in 1945 (A. 291).

The FBI searched the files of the Hotel Hilton to find proof of Gold's stay or stays at that hotel in 1945. The files and records of the Hotel Hilton are so kept that there is an indexing both by name and by card number. Thus, if one registration card or invoice covering Harry Gold was to be found his other registration cards and invoices, if any, would have been found in the very same place and at the same time (A. 291).

But the FBI did not find the "original" Exhibit 16, the alleged June 3rd card, at the Hotel Hilton on May 23, 1950 and that is not contested by the government. Indeed there is no suggestion as to where or how it was found or by whom.

The government acknowledged in its briefs below that the June 3rd card was "acquired" at a different and obviously at a later time than the September 19th card and that the two cards were "handled in a different manner" (Gov't br., p. 53; A. 292). Every other exhibit obtained by the FBI introduced into evidence bore the initials of one or more FBI agents* (A. 301).

On September 7, 1966 Elizabeth McCarthy, an attorney and an acknowledged leading expert in questioned documents, made a detailed microscopic examination of the photostatic copies of the alleged "originals" of the two registration cards of the Hilton Hotel. In addition she

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* The photostat of a bank record which was introduced into evidence, Exhibit 17, will be discussed *infra*.

had in her possession various writings of Anna Kinderknecht (now Mrs. Larry A. Hockinson), the hotel clerk whose initials were purportedly inscribed on both cards (A. 389-390, 393-394).

Mrs. McCarthy found that the handwriting on the September 19th card was that of Anna Kinderknecht (Mrs. Hockinson) and that the writing on the June 3rd card was *not* her handwriting (A. 394-395).

Prior to rendering this expert opinion which is not disputed either by the lower courts or the government, Mrs. McCarthy found factual evidence by means of microscopic examination that in the very area of the June 3rd card where the simulated handwriting of Anna Kinderknecht appears there had been erasures of handwriting and the imitation script was overwritten in the very area of the erasure, and in some instances all of the prior handwriting had not been removed. There was also evidence of erasure and overwriting where Harry Gold's handwriting was found (A. 390-393).

Government Exhibit 16 has on its face, in the spurious handwriting, the date June 3, 1945 with a time stamp on the rear of the card dated June 4, 1945, 12:36 P.M. The September 19th card bears both on the front and rear portions the written date September 19, 1945 and the time stamp dated September 19, 1945 at 12:34 P.M.

On August 4, 1951, four months after sentence, the government stated that it returned the original to the Hotel Hilton at Albuquerque at a time when by state statute and the custom of the hotel it was ripe for immediate destruction in the sixth year following the year of registration, i.e., 1951. In a letter to one of petitioner's counsel, the government presumed that the date of destruction was 1957, computing the five year period from the date of return rather than the date of registration (A. 302-303).

The September 19, 1945 card was retained until 1960 although never used in the trial and it then was destroyed by the government (A. 303).

Thereafter petitioner's counsel made innumerable inquiries to the Department of Justice concerning both the June 3rd and the September 19th cards, the time and circumstances of their acquisition, the persons involved, and any records reflecting the facts or information to be derived therefrom, all to no avail (A. 305-306).

Some time in June, 1961 Walter and Miriam Schneir obtained access to 14 hours of disc recorded pre-trial interviews between Gold and and his attorneys, John D. M. Hamilton and Augustus S. Ballard, along with numerous other written materials (A. 351-355). The Schneirs were independent investigators intending to write about the case after the completion of their research. They in turn made a taped copy of the interviews and reproduced copies of some of the documents given. This information and material was not made available to petitioner's attorneys until the latter half of 1965.

The recorded interviews between Gold and his attorneys had occurred on six occasions, June 1st, June 6th, June 8th, June 14th, June 23rd and August 9, 1950. At the fourth interview held on June 14, 1950, after he had been interrogated for at least 80 hours by the FBI alone and after 23 days in custody (Exhibit A), Gold, for the first time, made reference to a June 3rd meeting with an unidentified G.I. In narrating that story he made no reference whatsoever to registering or staying at the Hotel Hilton (reel 4, p. 53).*

Rather he stated that after leaving the rooming house he had checked his bags at the railroad station and from there directly sought to find the G.I. at the address given

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* The transcript of the interviews is designated by reel number and page and in some instances side "1" or "2" of the reel.

(reel 5, p. 38). He was explicit in stating that he had stayed at the Hotel Hilton on one occasion only, that the investigating agents had verified this fact and that was on September 19, 1945. He stated in part:

> "I have made one omission with regard to Albuquerque, and that is the fact that I had registered at the Hotel Hilton in Albuquerque on the occasion of the second trip [to see Fuchs].
>
> "This was particularly necessary because I was running out of funds."

He went on:

> "I would like to state that my stay at the Palmer House on the occasion of the second trip, my stay in—at the Hilton Albuquerque had all been verified through information that I had given the investigating agents." (reel 4, pp. 72-73—June 14, 1950)

At no time did he state or suggest or refer to any stay at the Hilton in June of 1945.

The government's sole response to all of this direct and circumstantial evidence was that it could, if compelled, give evidence to the effect that all cards of the Hotel Hilton of June 3, 1945, now admittedly all destroyed, were mis-stamped "June 4." It advised the court that it feared doing so lest it would create an issue of fact and thus result in a hearing (T.M. 117-120).*

The petition and its supporting papers *prima facie* establish as to Exhibit 16 the following:

> (a) Exhibit 16 contained the handwriting of someone other than Anna Kinderknecht and the simulated handwriting included her initials "A.K.".
>
> (b) It contained unexplained erasures of writing and overwriting at critical places particularly in the area of the simulated handwriting.

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* "T.M." refers to the transcript of argument held September 12, 1966.

(c) The date stamped on the back of the card was June 4, 1945, as contrasted with the date June 3, 1945, on the face.

(d) The alleged original of the photostat, Exhibit 16, was obtained by the government at some undetermined time after the arrest of Harry Gold and from an unspecified place by a person whose identity the government refuses to disclose although the September 19th card by its markings was obtained by the FBI on May 23, 1950.

(e) Gold, in his pre-trial statements to his attorneys mentioned that he stayed at the Hotel Hilton in Albuquerque only once and that was in September, 1945.

(f) Unlike all other exhibits in the possession of and retained by the government, it bore no legend as to the date of its acquisition by the FBI and no FBI agent's initials.

(g) The alleged original of Exhibit 16 was returned by the government to the Hilton Hotel in August of 1951, when it was ripe for destruction, according to known hotel policy and practice.

The June 3rd Meeting

Gold's recorded statements to his attorneys, given over a period of two months, were made after extensive hours of interrogation by the FBI which, by August 9th, well exceeded 160 hours, the last interview being given after Gold had been in custody for 80 days. In the course of his interviews Gold added, amended and recast his story from time to time.

Gold stated from the very inception of his interviews that he was telling his attorneys with great particularity all of the facts he had given to the FBI. These interviews were given with the aid of elaborate notes which he had prepared in the course of his interviews, interrogations and discussions with the government (reel 1, side 1, p. 17; reel 2, side 2, p. 16; reel 3, pp. 28, 35; reel 4, p. 56; reel 5,

pp. 30, 31; reel 6, pp. 35, 55). He advised his attorneys that from time to time the FBI supplied him with information concerning the background, activities and attitude of those about whom he was giving information, and what they were saying to the government (reel 3, p. 33; reel 5, p. 51; reel 7, pp. 44, 46-48).

In his last interview he acknowledged to his attorneys, to their distress, that he had been telling deliberate lies to them and had perjured himself before the grand jury which indicted the Rosenbergs (reel 7, pp. 66-71; reel 7, pp. 38-39) and that it was necessary for him to recast substantial portions of the story as previously given and make additions thereto.

The record reveals that it was not until some time after the arrest of Greenglass * that Gold was able to "recall" his name with the aid of investigating agents who gave him a list of twenty names and by a cooperative method of selection "lo, Greenglass was at the top" (Exhibit F., p. 1085).**

After the arrest of Julius Rosenberg he then suddenly "recalled" that at one of his rendezvous in February of 1950 after the arrest of Fuchs he believed the Soviet agents had had Rosenberg check on Gold's possible surveillance by the FBI and after seeing his picture in the newspapers he now recalls seeing Rosenberg walking on the same side of the street smoking a cigar (reel 7, pp. 34-35). By the time Gold prepared his written statement of October 11th he had elaborated upon this alleged Rosenberg surveillance with recognition signals such as a curved stempipe, cigars

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* News of Greenglass' arrest was immediately reported in the press.

** An October 11th statement prepared when all of the cast of characters had been completed and was an exposition of Gold's explanation of his conduct and proof of his atonement made in preparation for the time of sentence.

and other means of mutual identification (Exhibit F, p. 1085).

Some years later, Gold once again revised this after-acquired knowledge and placed Rosenberg in a restaurant looking at him through a window, the cigars and pipe omitted. The prosecution wisely chose to ignore this most obvious concoction made at a time when he was assiduously attempting to ingratiate himself with the government prior to his sentencing.

All of the pre-trial material which the petitioner has been able to obtain reveals that Gold did not include any of the "linkage" evidence (the jello box, Julius, the replacement of a woman courier). Further, the corroborative evidence of a stay at the Hotel Hilton in June of 1945 is refuted by his statements; as is his testimony that Yakovlev declared that the material obtained was "extremely excellent and very valuable".

The government, fully aware of the significant omissions, basic contradictions and belated additions, knew that Gold was altering his story and testifying falsely to meet the needs of the government. Notwithstanding this fact the government permitted itself to be an active party to the knowing use of false and perjured evidence and suppressed and failed to disclose exculpatory evidence within its possession.

The Lower Court's Opinion on June 3, 1945 Card and Meeting

The lower court's determination and finding that the evidence relating to Exhibit 16 did not constitute a sufficient showing to warrant a hearing, with the government standing silent, reveals, upon examination, that the court *ex parte* made fact findings on the issues presented upon speculation as to explanation not even tendered by the government in its briefs or argument. At best it played the role of an appellate reviewing court and avoided a "trial-type" proceeding.

The lower court acknowledges that Anna Kinderknecht did not write on Exhibit 16 and that her initials were not placed on that exhibit by her (Op. 30). It notes the inconsistency of the time stamp on the back with the date placed on the front of that exhibit (Op. 33), it admits "erasures and smudges" (but ignores the fact that the spurious handwriting was superimposed) and also acknowledges the lack of FBI initials or date of acquisition and assumes that the card was returned by the government to the hotel in August of 1951 (Op. 33).

In disposing of the Exhibit 16 charges the court at no time looked at the totality of the facts presented which were sufficient to command that a hearing be granted to afford petitioner an opportunity to substantiate his charges. Each element of the factually supported allegations was considered in isolation and disposed of essentially by *ex parte* findings of fact. We shall deal with the findings seriatim below.

Opinion.

> The fact that the hotel clerk did not write the card that bore her initials "does not, in one fell swoop, permit the inference that it [Exhbit 16] was 'forged' ", nor "warrant the inference" that it was "not a record kept in the regular course of the Hotel Hilton's business; neither does it further warrant the inference that the card was fabricated and contrived". (Op. 31)

The petitioner does not claim that the forgery is proved "in one fell swoop". All of the evidence should be considered together; not one item of proof in isolation. Moreover, how and why the court could conclude that it was the practice of the hotel to have one undesignated person write another clerk's initials and simulate her handwriting is not set forth in the opinion. This is mere speculation not even tendered by the government. If there be an explanation, it is for the government to make and prove at a hearing.

Opinion.

> One need not be an expert to discern that the handwriting on the June 3rd card is different from that of the September 19th card. (Op. 30)

Gold did not testify as to his stay at the Hotel Hilton at Albuquerque in September of 1945. The June 3rd card was tendered after his testimony was completed and after two intervening witnesses. The September card was never presented at the trial and there were no two documents for the defense to compare. Comparison by an expert together with the other supportive circumstantial evidence, leads one to accept the petitioner's allegation of forgery. If Exhibit 16 ever was an original registration card of someone staying at the hotel, it has clearly been altered. If there be a better explanation, let the government advance it. Let a hearing be held. Let petitioner be put to his proof.

Opinion.

> The opinion disposes of the absence of FBI initials as a matter of no substance since Exhibit 17, a bank record, is also without an agent's initials. (Op. 33)

It must be noted that Exhibit 17 was a photostat of a permanent bank record still in the bank's possession and the original bank record itself has attached to it an FBI identification that it was delivered to the government at a designated time and examined at an FBI laboratory. Every other exhibit acquired by the government and introduced into evidence had such a stamp or notation and such is the standard operating procedure of that agency, a course of action followed except when the document has been elaborately certified. This is alleged in the petition and not denied (A. 301).

Opinion.

> The lower court justifies the return of the "original" of Exhibit 16 in that it was the photostat which

> was the exhibit. The court also concludes that the parent of Exhibit 16 was destroyed in 1957. (Op. 33)

True, the photostat was the exhibit. But the appeal had not yet been subject to appellate review when the government returned the "original". This was a capital case and the death sentence had been imposed. In the event of a new trial the prosecution might well have been required to produce the original hotel card, if there was one. The government knew that after destruction of the alleged original, the means and methods of determining when the writings on the card were imposed could not be scientifically determined. Under the practices followed by the hotel the card would be destroyed in 1951, after five calendar years had elapsed from the year of registration. The government's conduct in consenting and permitting the spoilation or destruction of a document creates a presumption of falsity, an inference which must be rebutted by the spoiler. (*Spoliator contra spoliatorem omnia praesumunter.*).

Opinion.

> An adverse inference is drawn from the fact that "Additionally and significantly, the petitioner is silent as to the absence of any affidavit from Mrs. Hockinson [the hotel clerk]. She is one person still available who can testify with respect to the June 3rd card, whether it was kept in the regular course of the hotel's business, whether it is authentic, and the practice with respect to the preparation of registration cards by the hotel clerks. The absence of an affidavit or an explanation takes on added significance since her whereabouts are known to the petitioner . . . " (Op. 32)

The question of the authenticity of the June 3rd card was brought to the attention of the government almost a year prior to the filing of the petition in May of 1966. Indeed, the FBI investigated and during that period

of time went to the Hotel Hilton and spoke to various persons and we are quite certain the government knows the whereabouts of Mrs. Hockinson. Yet no comment or adverse inference is drawn from the fact that the government or its investigative agents have not come forth with an affidavit from the "one person still available who can testify." Not every person with knowledge of the facts is disposed to make an affidavit, particularly in a case such as this. At a hearing the clerk could be subpoenaed to testify. Instead the court's response is, in effect, an unwarranted and impermissible adverse inference and finding against the petitioner only. The court has raised an issue of fact upon a speculation and opted an inference against petitioner and rejected one adverse to the government. This issue cannot be resolved by the court without a hearing.

Opinion.

> The court concludes, once again without any evidence, without any affidavit from the government, that the card was destroyed in 1957. (Op. 33)

The government might have obtained an affidavit as to the time of destruction. Apparently, for reasons of convenience or otherwise, it has again failed to do so and is not faulted. These representations by the government, upon which the petitioner will not rely are, nevertheless, utilized by the lower court as a basis for disposing of an issue of fact.

Opinion.

> It is stated that "petitioner suggests that counsel did not cross-examine Gold" because of the prosecution's statement of a witness being on the way with the original document and that such a suggestion "is demonstrably false". (Op. 33)

The court has once again set up a straw man, since no such suggestion appears in the record or petition. What-

ever may be the reasons counsel did not cross-examine Gold, petitioner does not allege the one advanced by the court. It is perhaps errors such as this and a general misreading of the petition which permitted the district court to conceive the entire matter to be a "product of a fertile imagination" and permitted it to make the equally erroneous and unfair charge that the petition has substituted "vituperation" for "lack of evidence" (A. 483).

Opinion.

> The lower court explains Gold's omission of the June registration at the Hotel Hilton in his statement to his attorneys, stating: "However, in his June 14th recital to his lawyer of efforts to identify the G.I. and where the June 3rd meeting took place, among other matters he stated 'I have looked at dozens of reels of motion pictures *starting with the Hotel Hilton* and going all the way past undoubtedly the street where this G.I. lived'. [emphasis supplied] Transcript of Tape Recordings, reel 5, p. 43" (Op. 39 fn. 80).

Thus the court seeks to dispose of this crucial fact issue by inferring and finding that Gold stayed at the Hilton in June of 1945 because the persons working with Gold started the showing of films of areas of the city at the Hotel Hilton. The statement quoted is more suggestive of Golds' susceptibility to adopt a suggested story than evidence of a stay at the Hilton in June of 1945. Clearly on the basis of that statement by Gold the court could not find that the files and records of the case conclusively show that petitioner was not entitled to a hearing. At best it might be used by the government at a hearing. The courts below erred in permitting this *ex parte* determination of a fact issue.

Opinion.

> In refusing to grant petitioner a hearing as to Exhibit 16 as well as the June 3rd meeting, the court found "there is not a word of direct evidence to

support the serious charges made upon information and belief" (Op. 29).

It is difficult to conceive how the court could say there was no direct evidence as to the physical object itself, government Exhibit 16. That the direct evidence must on this application be such as to prove the ultimate fact finds no support in law. The court's aversion to circumstantial evidence is particularly inappropriate in this instance. The Court of Appeals in rendering its opinion on the appeal from the judgment of conviction in 1952 found that the case upon which the conviction was obtained essentially involved lengthy circumstantial testimony, *U.S.* v. *Rosenberg,* 195 F. 2d 583, 594, and this is characteristic of many a conspiracy trial.

The court refers disparingly to statements made upon information and belief. In fact all essential elements of the petition is alleged on knowledge. Paragraph 63 of the petition alleges in light of the circumstantial evidence presented and the specific facts alleged that upon information and belief the government knew of the false testimony and the Gold statements established that it clearly helped in the creation of the false evidence. Paragraph 74 of the petition says that upon information and belief Fuchs misdescribed his courier to the British and American authorities. The source of this information was the article of J. Edgar Hoover, *The Crime of the Century,* Readers' Digest, May 1951. Other portions of that paragraph were attested to by FBI officials in court at the time of Gold's sentencing. The third allegation made upon information and belief is that for the period "from May 1st to June 1st, 1950 the broad outlines of the Gold "confession" were developed and altered from time to time with the aid, suggestion and endorsement of the government, but the false statement could not then be completely contrived since there was not yet a sufficient cast of characters and the necessary details of the false testimony could not at that time be in final form" (A295-296). The paragraph goes on to state that Gold met

with counsel on June 1st for a brief period and that the June 3rd meeting had not yet been developed and his memory had not yet been fully refreshed.

In fact the Gold interviews with his attorneys support all of the fact statements in that paragraph and were such as to establish a *prima facie* showing of prosecution misconduct. A reading of the opinion would give the impression that Gold intentionally withheld the June 3rd affair until directed to disclose these facts by his attorney on June 1, 1950 and at that time he advised the authorities of this event (Op. 36-37). A reading of the transcript of the interviews establishes that he had given the event and names of the people allegedly involved, except one (Reel 1—June 1, 1950, p. 8). But in a subsequent interview he advised his attorneys of the withheld name—Alfred Dean Slack (Reel 4—June 8, 1950, pp. 5-6). Even in his October 11, 1950 statement Gold claimed he had no "recall" of the June 3rd affair until "sometime after my arrest" (Exh. 7, p. 1085). The lower court erred in making the finding that Gold *must* have told about this affair prior to June 14, 1950, the day prior to Greenglass' being brought into Federal custody. In his chronology of events dated June 15, 1950 this event was entirely missing and was not placed in his chronology until June 16, 1950 at the earliest (Exh. B).

The court's opinion reads more like one given after an evidentiary hearing had been held, the issues of fact framed, and petitioner had presented all his witnesses and documentary evidence to substantiate the serious charges. The sufficiency of a showing cannot be equated to the proof required upon which the judgment of conviction should be vacated and set aside. Using the wrong standard the court faults the petitioner for not having produced all of his evidence but nevertheless excuses the government for its failure to present any evidence to refute the factually supported allegations of the petition, consisting in substantial part of facts *dehors* the record.

Gold testified at the trial that *Yakovlev said the material was* "extremely excellent and very valuable" (R. 831). But on June 14, 1950 Gold stated to his attorneys that *Yakovlev stated* "the information received had not been of very much consequence at all" (Reel 5—June 14, 1950, p. 43). In a "Chronology of Work" (Exh. B) Gold wrote on June 16, 1950 "*Earlier I have said* that I believed the information to be unimportant *but I have since learned* that it was highly valuable. In the October 11, 1950 statement (Exh. F, p. 1085), he said, "as has been said before, until some time after my arrest all memory of this incident had fled from me (probably this was because *Yakovlev* had subsequently—and with intent to mislead—*told me* that the information received was of no value)". These statements reveal not merely that Gold was giving false testimony with the knowledge of the prosecution as to what Yakovlev allegedly stated, but that it was the government who told Gold to say that the information was "highly valuable" and based upon this suggestion from the government he falsely incorporated it into the alleged Yakovlev discussion.

The lower court found that "it is not altogether clear from the record that in fact this is a contradiction" (Op. 39, fn. 81). The court goes through an elaborate attempt to remove this "contradiction" and then finds that it could not possibly support the allegations of perjury. Here once again the court exceeded its authority in thus disposing of the matter without a hearing.

The concluding portion of the opinion is one that might possibly be directed to a motion for a new trial based on newly discovered evidence—petitioner could or should have attempted prior to and during trial or in any event at an earlier date to obtain this information. Implicit in such a statement is that prosecution misconduct, the obtaining of a conviction by fraud, can be immunized by some statute of limitations. The meaning of the Writ and the decisions of this Court deny such interpretation.

Previous Post-Trial Applications

The first 2255 motion has previously been discussed (see pp. 34-35, *supra*).

The second 2255 motion also sought relief under Rule 33 of the F.R.Cr.P., based upon newly discovered evidence concerning a console table; the discovery that Greenglass had lied in concealing the fact that he had stolen uranium from Los Alamos; and that his testimony was in conflict with a portion of a one-page pre-trial statement to his attorney. The motion did not deal with Exhibit 8 or Exhibit 16. No hearing was granted.

The next proceeding was instituted in the Supreme Court by writ of habeas corpus, seeking to set aside the sentences imposed on the ground that they were not authorized by the Atomic Energy Act of 1946, which superseded in this respect the Espionage Act of 1917. A stay of execution, pending a determination of this application, granted on June 17, 1953, was vacated some two days later, the Rosenbergs were executed, and thereafter petitioner's application on the same grounds was denied.

In 1956, Sobell instituted a 2255 motion, charging knowing use of perjured testimony as to a claimed deportation by the Mexican authorities in that he was actually abducted by individuals acting under the control of officials of this country. Relief was denied without a hearing.

In 1962, a 2255 motion was made by petitioner on the grounds that (a) the Court had been without power to impose a war-time sentence, in that there was no charge to or finding by the jury that petitioner had joined the conspiracy in time of war; and (b) under *United States* v. *Grunewald*, 353 U.S. 391, the cross-examination of Ethel Rosenberg on her assertion of the Fifth Amendment at the time of her appearance before the Grand Jury, was unfairly used as an attack upon her credibility and as proof of her guilt, thereby depriving all of the defendants of a fair trial. That motion was denied on the legal issues posed.

Reasons for Granting the Writ

1. The order of the district court, affirmed *per curiam* by the Court of Appeals on the opinion below, denying petitioner's request for a hearing, constitutes such a substantial departure from accepted standards in habeas corpus and Section 2255 proceedings, as to require this Court to exercise its power of supervision. The opinion below disregards the issues and facts posed in the present motion and leaves unchallenged conduct of the prosecution in the course of a criminal trial which cannot be condoned and if left uncorrected can only have an adverse effect upon the administration of criminal justice.

2. At no time since the judgment of conviction has this Court ever reviewed and determined the fairness of the trial. Judicial evaluation of petitioner's trial is inextricably intertwined with the fate of his co-defendants who were said to have committed a crime the consequences of which were claimed to have imperiled the very existence of this nation. It was in this belief that the jury convicted them, as well as the petitioner, and the sentencing court felt impelled to impose sentences of death. The petitioner, while not said to have been directly involved in the transmission of atomic information, was said to have been a member of the notorious conspiracy established on the trial by the "proof" of the importance of the data said to have been transmitted, and thus he received the maximum prison sentence of thirty years.

The present petition now presents well substantiated allegations of fact which, if established at a hearing, would constitute proof that petitioner and his co-defendants were deprived of a fair trial. A reconsideration of the fairness of the original trial in respect of petitioner's two co-defendants has, as Mr. Justice Frankfurter pointed out, "the appearance of pathetic futility." *Rosenberg* v. *United States*, 346 U.S. 273, 310. But as the Justice also reminded

us, "Perfection may not be demanded by law, but . . . the capacity to counteract inevitable though rare frailties is a mark of a civilized legal mechanism." 346 U.S. 310. The fact that a hearing might establish that the Rosenbergs' conviction and execution were unfairly obtained should not become an unstated obstacle to petitioner's right to a hearing. The capacity to permit inquiry and accept the facts if proved, to engage in "sturdy self-examination and self-criticism", is the underlying judicial responsibility presented by the present application.

Petitioner asks only that he be afforded a hearing because he has made a sufficient legal and factual showing entitling him to such relief. He asks that he be afforded, in spite of his involvement in a controversial case, equal protection under the laws, that the normal standards applicable to the Writ as enunciated by this Court be applied to him.

Indeed, it is in circumstances such as this that the Great Writ affords a remedy in "the unceasing contest between personal liberty and government oppression . . . a central role in national crises . . . not only in England in the 17th century, but also in America from our very beginning and today. . . . Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment; . . .". *Fay* v. *Noia*, 372 U.S. 391, 400-402.

There can be no doubt that petitioner's trial was held in a setting wherein "the claims of order and of liberty clash most acutely," when habeas corpus must play "a central role." *Fay* v. *Noia, supra.* It is the essence of the Great Writ that serious charges of fraud, whenever discovered, be aired in open court and that injustices of a former day shall not be forever entombed behind the walls of the finality of judgments.

3. The rules which guarantee that this instrument of judicial correction will not be deprived of meaning and

power are clear and have been fully articulated by this Court.

(a) A district court is required to grant a hearing unless in the words of the statute "the motion and files and records of the case conclusively show that the petitioner is entitled to no relief." *Sanders* v. *United States,* 373 U.S. 1; *Townsend* v. *Sain,* 372 U.S. 293; *Fay* v. *Noia, supra; Commonwealth of Pennsylvania* v. *Claudy,* 350 U.S. 160; *Chessman* v. *Teets,* 350 U.S. 3; *Machibroda* v. *United States,* 368 U.S. 487. To deny petitioner a hearing, the factual allegations must be clearly and "patently frivolous or false on a consideration of the whole record." *Commonwealth of Pennsylvania* v. *Claudy, supra.* Even if the allegations were improbable or unbelievable, when based upon extrinsic evidence, that may not serve to deny one an opportunity to be heard and present evidence. *Walker* v. *Johnston,* 312 U.S. 225; *United States* v. *Hayman,* 342 U.S. 205; *Smith* v. *United States,* 270 F. 2d 291 (App. D.C.). A hearing must be granted unless the allegations are merely "vague, conclusory or palpably incredible. . . ." *United States* v. *LaValle,* 319 F. 2d 308 (C.A. 2).

(b) A district court is required to accept as true all of the allegations of the petition and facts tendered in support thereof not conclusively refuted by the record in determining its legal and factual sufficiency. *Ex parte Hawk* v. *Olsen,* 326 U.S. 271; *Durley* v. *Mayo,* 351 U.S. 277 (dissenting opinion).

(c) A collateral attack charging a denial of a fair trial based upon extrinsic evidence must, by the nature of the charge, be "inconsistent" with the files and records of the case. Where such issues are raised upon facts outside the record a hearing must be granted and the petitioner must be afforded an opportunity to substantiate his allegations. Thus, where there is extrinsic evidence and factual issues are raised thereby, the denial of a judicial proceeding, an evidentiary hearing, with all the powers of process associated with it is of itself a denial of due process and depriva-

tion of the rights granted by the writ. *Sanders* v. *United States*; *United States* v. *Hayman*; *Commonwealth of Pennsylvania ex rel. Herman* v. *Claudy*, all *supra*; *Brown* v. *Mississippi*, 297 U.S. 278; *Pyle* v. *Kansas*, 317 U.S. 213; *Price* v. *Johnston*, 334 U.S. 266; *United States* v. *Rutkin*, 212 F. 2d 641; *Sanders* v. *United States*, 205 Fed. 2d 399 (C.A. 5).

4. In *Townsend* v. *Sain, supra*, this Court discussed at length the standards applicable to the granting of a hearing. In construing the mandate of Congress and the history of habeas corpus, this Court found that the writ was "plainly designed to afford a trial-type proceeding," and with all the powers to compel the production of witnesses and documents, confrontation and examination. This Court then noted that, in examining the files and records of a case, whether of a prior state or federal proceeding, the nature of the writ "refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review." Since "Constitutional claims turn upon the resolution of factual issues", a necessary corollary is that "Where the facts are in dispute the federal court in habeas corpus must hold an evidentiary hearing if the habeas corpus applicant did not receive a fair and full evidentiary hearing. . . ." While that discussion related to habeas corpus proceedings in a state court as noted in *Sanders*, these standards *a fortiori* are applicable to habeas corpus proceedings involving a federal conviction.

The lower court, in this instance, failed to apply any of the standards enunciated above, in effect assumed the facts as found in the files and records of the case, and overrode any issues of fact created by the extrinsic evidence contained in the present petition. The lower court considered its task that of appellate review. When faced with issues of fact, the court permitted its *ex parte* determination of the issues to be a substitute for a "trial-type proceeding".

Moreover, the lower court ignored substantial portions of the trial record to which the facts *dehors* the evidence were addressed. As a result, a hypothetical trial was reconstructed stripped of the very theme of the case as it has been structured by the prosecution—the actual theft of the bomb.

5. For the purpose of considering the sufficiency of the showing made by petitioner, we assume that if Greenglass had truly passed to a foreign power a facsimile of Exhibit 8 and a description of the bomb, however infantile and erroneous, such conduct would have constituted a violation of the Espionage Act. But the jury's determination that Greenglass gave Rosenberg such sketch and description for submission to the Soviet Union and that a conspiracy existed was, or might well have been, the result of its having been persuaded that the sketch had the attributes claimed by Derry and the prosecution. The petition and the supporting affidavits established *prima facie* that the Derry testimony and the government's statements were false. Yet the court below erroneously assumed that the jury would have made the same determination absent the false testimony of Derry and even if the government had not been guilty of false and inflammatory comments.

6. The court below could not constitutionally disregard the scientists' affidavits which contained an imposing number of statements of fact, true, scientific facts, but nevertheless facts, which the government did not deny. The various omissions of elements and necessary component parts of the bomb systems prerequisite to its construction and operation, the misdescriptions, the misleading nature of the entire sketch and accompanying testimony make evident that the information was not what it was stated to be either by Derry or the prosecution.

The scientists found that the lack of information and scale made the Greenglass material essentially meaningless and that such data was devoid of "the principle or formula

of the operation of the bomb." That there was no single formula or principle and that those that were involved were not reflected in any way in the questioned material and testimony is not disputed by the government.

Thus, we are left with at best a bizarre and garbled sketch and description, an ignorant caricature of the bomb, lacking any of the attributes given it by Derry or the prosecution at the trial. (See A.314-349, 412-414, 422-425 and pp. 23-29, 32, 33, 39, *supra.*)

The lower court was required to accept prima facie that the Derry evidence and the government statements were false or at any rate that there was a factual issue as to their falsity. The only attempted response found in the lower court's opinion is that somewhere, in this haze of confusion, it might be possible to speculate that the phantom "principle" involved in the operation of the 1945 atomic bomb and from it the "actual construction" might be discerned in Exhibit 8. Yet the scientists categorically state that there is no such principle involved in the operation of the bomb and they attest to the fact that no such principle was reflected in the challenged testimony. To arrive at a factual conclusion contrary to the scientists, the court must of necessity have resolved issues of fact which it could not lawfully do without a trial-type proceeding.

7. In light of the facts alleged in the petition and the supporting affidavits of the scientists, we look to the statements and representations made by the prosecution to the court and jury concerning the significance of the Exhibit 8 data. The prosecution stated that through Greenglass the defendants had stolen "this one weapon that might well hold the key to the survival of this nation . . . the atomic bomb" (A. 221, R. 183). Exhibit 8 was described as "the cross-section of the atom bomb itself, the Nagasaki bomb" . . . "We know these conspirators stole the most important scientific secrets ever known to mankind"

(R. 1519). The information received, it was stated, could then be used "to destroy America and the people of the United Nations" and therefore "no defendants ever stood before the bar of justice less deserving of sympathy than these three (R. 1535).

In detail the affidavits of Dr. Linschitz and Dr. Morrison, supported by those of Dr. Christy and Dr. Urey, established the utter falsity of those statements made to the jury at the most crucial moments of the trial—the opening and the summation. We do not for the moment refer to the false authentication and claim to accuracy made by Derry in the course of his testimony, which the prosecution used in part as authority for such statements. In fact, the prosecution's statements far exceeded the Derry testimony in their impact on the court and jury.

These false statements, misrepresentations and gross exaggerations by the government have not been considered or discussed in the opinion below.

The prosecution's conduct was not a marginal overstepping of the bounds of propriety or mere excess of advocacy; this was a prosecutor disregarding the obligation that justice be done. This was not a prosecutor acting with earnestness and vigor; rather, it was striking foul blows and clearly using "improper methods calculated to produce a wrongful conviction." *United States* v. *Berger*, 295 U.S. 78, 88; *United States* v. *Zborowski*, 271 F.2d 662 (CA 2); *Kyle* v. *United States*, 295 F.2d 507 (CA 2). These false statements related to the most inflammatory and prejudicial aspect, indeed the heart of the prosecution's case against the defendants. The prosecution created an atmosphere in the courtroom which not only misled and even intimidated the jury, but which overwhelmed them and forced them to conclude that they had an affirmative obligation to convict, reasonable doubt or not, and that their own existence, that of their immediate families and the entire nation had been put in imminent and extreme peril by the alleged traitor-

ous conduct of the defendants whose conviction and punishment thus became a patriotic duty of the jury.

The bewildering success of the Soviet Union in constructing an atom bomb in 1949 was explained: it was the fruit of Exhibit 8!

These statements, along with other devices used by the prosecution, not only established the validity of the Greenglass testimony *in toto* in the eyes of the jury, it created a courtroom atmosphere no less hostile than that of a surging crowd on the streets demanding death for the defendants. The decisions of this Court from *Mooney* v. *Holohan*, 294 U.S. 103; *Pyle* v. *Kansas*, 317 U.S. 213; *Mesarosh* v. *United States*, 352 U.S. 1, *Napue* v. *People of the State of Illinois*, 360 U.S. 264, to *Giles* v. *Maryland*, 386 U.S. 66 and *Miller* v. *Pate*, 368 U.S. 1 decided by this Court this past term and the line of cases that they represent put beyond question that such misconduct vitiates the entire trial, and the judgment of conviction must be vacated.

The government has had the opportunity to deny the factual showing made by the petitioner but it has failed to do so. If it acknowledges the facts alleged in the petition, the judgment must be vacated. In the alternative, upon the substantial showing made, the decisions mandate that petitioner be granted the limited relief he seeks—a trial-type hearing.

8. The prosecution's misconduct was not limited to those statements. The prosecution advised the sentencing court that "The secrets they sought and secured were of immeasurable importance and significance . . . these defendants have affected the lives and perhaps the freedom of whole generations of mankind" (R. 1602). The sentencing court was led to believe the Korean War and its casualties were caused by the defendants' conduct and that their "betrayal" had altered the course of history to the disadvantage of our country by the passage of "what they

knew was this nation's most deadly and closely guarded secret weapon." When the prosecution in its brief to the Court of Appeals declared that with the Exhibit 8 material "a scientist could proceed with the actual construction of the bomb itself," it was once again perpetrating a horrendous fraud upon the court.

9. In the course of the trial the prosecution stated that the atomic information then being released was only temporarily declassified for the purpose of the trial in the light of its tremendous importance and that it would be immediately thereafter reclassified, it was making a false statement, as was learned in the summer of 1966 when the truth was out that the AEC had held that this material was declassified and subject to public disclosure at all times since 1951 (A. 165, 195). The false statements were made in the presence of the jury. In *Napue* v. *People of the State of Illinois, supra,* this Court quoted with approval Judge Fuld's statement in *People* v. *Savvides,* 1 N.Y. 2d 554, that "a lie is a lie, no matter what its subject, and, if it is in any way relevant to the case. . . ." a reversal must follow if the prosecutor knowing of the lie leaves it uncorrected. *Kyle* v. *United States, supra,* page 513. It can not be disputed that the lie was a lie in this instance and was "relevant to the case."

10. The magnitude of the fraud arising out of the prosecution's statements becomes even greater in its deceptive ploy of advising the jury that Dr. Urey and Dr. Oppenheimer (among other famous scientists) would be called as witnesses and of impressing the jury with the mistaken belief that these eminent scientists were in accord with the prosecution's claims, the testimony adduced by Greenglass and Derry, the authenticity and meaning of the Exhibit 8 data. The prosecution knew that it would not call these witnesses and did not even dare request their appearance or ask what they would say in the event they were called.

In similar light one must evaluate the impact upon the jury of the prosecution's statement that the Atomic Energy Commission had itself reviewed the entire matter and was in constant consultation with the prosecution throughout the trial. We now know that the Commission's evaluation of the material was quite different from that claimed by the government, but be that as it may, the jury knew that representatives of that Commission sat at the prosecution's table at the time of trial and were so identified.

11. Even if the prosecution had no personal knowledge and were it to be claimed that they acted in ignorant innocence, nevertheless the failure of the knowledgeable agencies of the government associated with the prosecution to advise the parties to the proceeding of the falsity of the statements or the errors or to dissociate themselves from such misleading statements or testimony renders the conviction vulnerable to collateral attack. *Brady* v. *State of Maryland*, 373 U.S. 83; *Alcorta* v. *Texas*, 355 U.S. 28; *Napue* v. *State of Illinois, supra*; *United States ex rel. Almeida* v. *Baldi*, 195 F.2d 815 (C A 3); *United States* v. *Wilkins*, 326 F.2d 135 (C A 2); *Barbee* v. *Warden Maryland Penitentiary*, 331 F.2d 842 (C A 4); *Giles* v. *Maryland, supra*; *Levin* v. *Katzenbach*, 363 F.2d 287 (App. D.C.); *United States ex rel. Thompson* v. *Dye*, 221 F.2d 763. Nor does the fact that the defense failed to request information lessen the fault of the government or reenforce the validity of the trial. See *Giles* v. *Maryland; United States* v. *Wilkins*, both *supra*, and cases cited above.

That the government agencies in this case failed in their duty cannot be disputed. The obligation of the government was even greater than usual in this case because it related to classified information, cloaked with a shield of secrecy which made it uniquely unavailable to the defendants. The error was further compounded in that the myth of the secret of the bomb established at the

trial and believed by the defense was such as to deter any request for classified data. It was only the government who knew the facts and therefore it was obliged to step forward with the requisite information to correct false or erroneous statements or testimony.

12. The witness called to authenticate the Greenglass exhibit and description was an employee of the AEC, John A. Derry. He was held out as an expert by the prosecution. He advised the court that he knew each and every detail of the construction of the bomb, what went into it, and he understood the entire subject matter. The court advised the jury that Derry was an expert whose help they needed in a subject so technical as that of the atomic bomb and its workings. (A 252-253 R 909-910). In authenticating and establishing the accuracy of Exhibit 8, Derry stated that it accurately gave the principle of the operation of the bomb, its construction, which any scientist could perceive, and that it was the bomb dropped at Nagasaki; and to substantiate his statements, he said that he had seen the bomb many times as well as drawings and he thus recognized Exhibit 8.

The scientists' affidavits and Derry's admission to Schnier establish that he was not an expert, that he lacked scientific background, and was not associated with the technical aspects of the bomb, and his claim to knowledge was false. The Exhibit 8 data, as the scientists have stated, does not disclose the construction of the bomb or the alleged single principle said to be involved in the operation of the bomb; it was *not* the bomb dropped at Nagaski; and that if Derry had seen the bomb, such view would not have disclosed its internal assembly; and, in any event, one would know that it was not as depicted in the sketch. If Derry were an expert and had knowledge, his authenticating testimony would necessarily be perjured. In either event, the Government knew his testimony was false.

13. The lower courts were required, in determining the sufficiency of the showing, to accept the factual statements contained in the petition and affidavits as true. That being so, the petitioner has made his showing of the knowing use of false and prejured testimony entitling him to a hearing. It cannot be disputed that if there was such knowing use of false or perjured testimony, the judgment of conviction must be vacated and set aside. *Mooney* v. *Holohan, supra*; *Brown* v. *Mississippi*, 297 U.S. 278; *Hysler* v. *Florida*, 315 U.S. 41; *Ex Parte Hawk, supra*; *White* v. *Ragen*, 325 U.S. 760; *Berk* v. *Georgia*, 338 U.S. 941; *Napue* v. *People of the State of Illinois, supra*; and *Giles* v. *Maryland, supra.*

The lower court's response to the petition was that any of the issues of fact which may have been raised as to the meaning or value of the Greenglass testimony were irrelevant in that the material allegedly passed to Rosenberg nevertheless constituted a technical violation of the Espionage Act. It ignored the impact of the statements of the prosecution and the Derry testimony in persuading the jury that Greenglass gave Rosenberg the sketch and that a conspiracy existed.

The court below incorrectly posed the issue as being whether Greenglass's testimony as to Exhibit 8 was given with his knowledge of its falsity. This is not the point of the petition. Greenglass may or may not have known of the infirmities of Exhibit 8, which he had created for the trial. It is the false claims of the prosecution and the false testimony of Derry which invalidate the judgment of conviction. The clear conflicts between the Derry testimony and that of the scientists were disposed of by the lower court by resolving the issues of fact *ex parte* against the petitioner. That in large part was done by misreading or taking out of context the scientists' statements, which may well be explained by the lower court's failure to comprehend the complex and technical concepts to which the scien-

tists were directing their comments in setting forth the facts concerning the truth or falsity, the accuracy or inaccuracy, of the Greenglass-Derry testimony and the prosecution's statements.

The lower court, therefore, did not address itself to the theory and thrust of the petition and the issues of fact raised. Hence, it could not see the prejudicial impact upon the jury of the prosecution's statements in conjunction with the Derry-Greenglass testimony.*

14. The lower court held that the question of "value" of the material concerned had been determined in the first 2255 motion and hence the statements of the scientists as to the lack of value, the absence of intrinsic worth, is merely a restatement of matters previously litigated. Even were that so, it would not preclude a subsequent petition based upon new facts previously not presented. The doctrine of *res judicata* is not applicable to a habeas corpus proceeding, as has been clearly and specifically enunciated by this Court. *Sandres* v. *United States; Price* v. *Johnston*; *Waley* v. *Johnston*, all *supra.*

But the issue of "value" of Exhibit 8 has never been previously litigated in any prior proceeding. In the first petition the issue was whether the government had capriciously and arbitrarily classified atomic information as secret under the Espionage Act in that the information was in the public domain. The court held that the govern-

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* The government in the brief below attempted on the grounds of national security to justify Derry's failure to dissociate himself from or to correct the errors in the Greenglass testimony because to do so would have resulted in the release of classified information, stating:

> "As Major Derry was not asked about any asserted errors in Greenglass's testimony and would have had to reveal classified information to specify any errors, his failure to do so showed neither perjury nor lack of scientific background."

The government is stating that due process is not a constitutional requirement in a case such as this.

ment did not act capriciously or arbitrarily in classifying atomic bomb information. The scientific or use value of Exhibit 8 was not the issue.*

The scientists, as does the petition, address themselves to the question of value and substance, the attributes and meaning of the Exhibit 8 evidence as testified to by Derry, and as stated by the prosecution. The affidavits establish that false testimony was given, and false statements made which, the record makes clear, misled the jury and the experienced trial judge.

15. The lower courts conclude that the Exhibit 8 data could have been obtained or unimpounded by the petitioner's counsel at an earlier time and they implicitly suggest that the scientific support presented could have been obtained sooner. This is a habeas corpus proceeding. The passage of time, the doctrine of laches, waiver or estoppel do not apply in habeas corpus proceedings. *Sanders* v. *United States, Commonwealth of Pennsylvania* v. *Claudy, Price* v. *Johnston, United States* v. *Morgan, United States* v. *Wilkins, United States* v. *LaValle,* all *supra*; *Farnsworth* v. *United States,* 232 F.2d 59 (App. D.C.); *United States* v. *Morgan,* 222 F.2d 673 (CA 2). A judgment void *ab initio* because of fraud and governmental misconduct does not become vitalized by passage of time—to so hold "would in fact make a dead letter of the ancient writ." *Haywood* v. *United States,* 127 F.Supp. 485. The statement that the material could be made available for subsequent proceedings was itself impounded and sealed.** The statement made at the most emotion-packed moment of the trial,

* As noted by the district and appellate courts, in *United States* v. *Rosenberg,* 108 F.S. 798, 200 F. 2d 666, Exhibit 8 remained impounded and had never been seen by any of the affiants who supported that application on the question of "secrecy".

** As previously stated the record reference (R. 903) given by the lower court refers to its availability for the purpose of examining Derry at the time of trial only.

at the disclosure of the "the secret," was not so engrained in the mind of petitioner and in fact he had no such recall.

In any event, the defense belief of the accuracy and significance of Exhibit 8 was shaped by the prosecution. Moreover, the Exhibit 8 material by itself, was thought to be by reason of prosecution's statement reclassified and in light of the restrictions then prevailing, no scientist would have been as able to freely give the information now presented, until the major declassification of information in 1961 and 1962.**

16. The problems confronted by the defense in obtaining any scientific aid from persons having knowledge of the development of the atomic bomb continued after the trial. An examination of the first 2255 motion reveals that there were affidavits of four scientists, scientists outside of this country, none of whom had been in any way involved in the development of the atomic bomb or had seen the crucial evidence. They were directed solely to the competency of Greenglass to prepare Exhibit 8, then impounded, on the assumption that it had the attributes stated by Derry and the prosecution. That defense counsel were forced to seek aid of foreign scientists even for that limited purpose reflects the fact that none could be obtained from any scientist in this country who was party to the development of the atomic bomb. This was obviously the result of the strict security regulations and classification procedures which cut off any effective communication with knowledgeable scientists, especially as the defendants were "untouchables".

Thus the constitutional right of confrontation in its true sense was not granted petitioner and his co-defendants.

** See Volumes I and II of *LAMS-2532 Manhattan District Project Y the Los Alamos Project* issued pursuant to contract with the Atomic Energy Commission distributed December 1961. See also the *New World, 1939-1946,* Volume I of *A History of the Atomic Energy Commission,* one of the authors an official AEC historian.

The right of confrontation is not merely the right to hear the evidence presented but it includes also access to documents or witnesses so as to evaluate the government's testimony and then to cross-examine the government's witnesses with the necessary information available. *United States* v. *Oliver*, 333 U. S. 257.

The defendants in this case were deprived of that possibility, which could have been ameliorated in some part only by the government's advising the defense of the defects, errors, omissions and deficiencies of the Greenglass testimony and exhibits, known to the scientists then strictly controlled by the government. Rather the government suppressed these facts and compounded the fraud by false authentication through Derry and false statements by the prosecution of the value of the information allegedly transmitted.

17. The opinion below nevertheless declares that petitioner is belatedly asserting a ground for relief which he could have raised in a prior 2255 proceeding (Op. 25-26). Such a contention is particularly inappropriate. The government's continued suppression of the facts and its permitting the fraud to continue in the first 2255 application and its failure to observe its affirmative obligations preclude the government from asserting as grounds for denying petitioner a hearing the doctrine of laches, waiver, estoppel, lack of diligence, let alone prior litigation of the issue. Suppression of information in any respect material to the offense charged or to issues of credibility, guilt or punishment, irrespective of good or bad faith on the part of the government, invalidates the judgment of conviction. *Brady* v. *State of Maryland*; *Alcorta* v. *Texas*; *Napue* v. *People of the State of Illinois*; *Brown* v. *Mississippi*; *United States ex rel. Almeida* v. *Baldi*; *Curran* v. *State of Delaware*; *Pyle* v. *Kansas*; *Giles* v. *Maryland*; *Levin* v. *Katzenbach*; *United States ex rel. Thompson* v. *Dye*; all *supra*.

Particularly appropriate is the statement of Mr. Justice Harlan in *Chessman* v. *Teets*, 354 U.S. 156:

> "Evidently it also needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist. This Court may not disregard the Constitution because an appeal in this case, as in others, has been made on the eve of execution. We must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands. The proponent before the court is not the petitioner but the Constitution of the United States" (p. 165)

18. The lower court's disposition of the Exhibit 16 charges was based upon its refusal to accept factually supported allegations which made a prima facie showing that the exhibit was a forged, after-contrived document. The extrinsic evidence tendered by the petitioner clearly created issues of fact which had never been raised or presented before.

The court, nevertheless, found that it was *possible* to explain the fact that the handwriting on the June 3rd card was not that of the clerk whose initials were purportedly inscribed thereon by speculating that this *may* have been the regular course of doing business at the Hotel Hilton, without an iota of evidence to substantiate that speculation. It ignored the fact that the *spurious handwriting was super-imposed* on that portion of the card where there had been erasures of other writings, merely noting that there were smudges and erasures, and nothing more. While the court in its opinion found that the variation in date on the front and back of the card was of no moment, it did not mention that the government had tendered an explanation orally at argument and its sole

refusal to reduce the explanation to writing was that it would result in an evidentiary hearing.*

The fact that the government acknowledged that it obtained the card under different circumstances and that it was handled in a different manner than that of the September 19th card (which bore the date of acquisition and FBI initials) was ignored by the court even though the government had refused to disclose the time, place and persons involved in acquiring Exhibit 16. The court found as fact that the claimed original of Exhibit 16 was destroyed in 1957 while the facts as alleged in the petition placed the time of destruction in 1951—soon after the government hurriedly disposed of the alleged document in August of 1951. The September 19, 1945 card, the government states, was retained until February 11, 1960 and was then destroyed.

The pretrial statements of Gold indicating that he had stayed at the Hotel Hilton on only one occasion (September of 1945) was in "one fell swoop" disposed of by the court's noting that the FBI when showing films of Albuquerque to Gold started with the Hotel Hilton.

19. In determining whether petitioner was entitled to a hearing, the lower courts were required to define the facts at issue based upon the extrinsic evidence. The opinion below found the facts in dispute, but then made *ex parte* determinations, and on that basis concluded there was no need for a hearing. In doing so, it ignored facts alleged and presumed no further proof would be adduced. It permitted argument and speculation to be a substitute for the fact finding process. In reaching these "findings" the court, in turn, premised its conclusions upon unwarranted or questionable speculations which find no support either in the files and records of the case or the papers presented. Hence, the petitioner was improperly denied an opportunity

* Transcript of argument held September 12, 1966, pp. 116-117.

to substantiate his sufficient showing and to prove facts at a hearing with the full powers of process available to him.

In *Townsend* v. *Sain, supra,* this Court enunciated standards to be applied in granting an evidentiary hearing. Even where there had been a prior hearing in the state courts, it was said to be necessary to determine whether an adequate trial-type hearing had been afforded which permitted the resolution of the factual disputes and whether "the fact finding procedure employed" was adequate.

The disposition of the petitioner's application was not based upon an adequate or proper "fact-finding procedure". Nor can it be said that the moving papers are merely "vague, conclusory or probably incredible" allegations or "patently frivolous or false on a consideration of the whole record." Even if the allegations, in the minds of the lower courts, had been improbable or unbelievable (a difficult hypothesis to assume), nevertheless as they were based upon extrinsic evidence, a hearing was required. *Commonwealth of Pennsylvania* v. *Claudy*; *Smith* v. *United States*; *Walker* v. *Johnston*; *United States* v. *Hayman*; *United States* v. *La Valle*; *Machibroda* v. *United States*, all *supra*.

The petitioner has made a sufficient showing, and he should be granted a hearing and put to his proof.

20. The petition alleges that there never was a Gold-Greenglass meeting in Albuquerque, N.M. on June 3rd, 1945, and Gold's testimony, as well as the Greenglasses', was false and perjured as the Government knew, and that the Government knowingly suppressed evidence which would have impeached this testimony. The opinion below acknowledges that in the course of Gold's interviews with his attorneys the first reference to a meeting with an unidentified GI was made on June 14, 1950. Greenglass was brought into custody on June 15, 1950 and it was not until some time after that Gold "identified" him.

It is not disputed that in his recorded interviews with his attorney, and written statements, both prior and subsequent to the Greenglass arrest, no reference whatsoever was made to any of the "linkage" testimony which the prosecution elicited from Gold at the trial in order to establish that the Rosenbergs arranged the alleged meeting to facilitate transmission of classified information to the Soviet Union. Absent from this material is any reference to a jello box or the phrase "I come from Julius", and there is a substantially different story given as to Gold's stay in Albuquerque and subsequent conversations had with the alleged Soviet contact with reference thereto. The court makes no reference to the fact that Gold admittedly altered and recast his story after hundreds of hours spent with investigators; that he acknowledged to his attorney that he had lied to them and to the Government that he had perjured himself in testifying before the grand jury in 1950 concerning the matters he testified to at the trial.

21. The lower court disposed of all the above by finding that Gold must have told the FBI of the June 3rd episode at an earlier date and assumes that this can be explained by the fact that the FBI and Gold's attorney "were not on parallel courses" in making their inquiries. The lower court also opined that the June 3rd affair may have been consciously withheld by Gold to protect Greenglass or that his failure to mention the event could be explained by the fact that the task of recalling fifteen or more years of intrigue would of necessity result in lapses of memory. Finally, while the linkage testimony is absent, says the court below, that does not "undermine the fabric of essential matters". Thus, what the prosecution and trial court felt essential, the lower court on this application considered of no significance. The lower court's reading of the transcript of the Gold interviews leads them to the conclusion that Gold is an impressive and persuasive witness and the allegations of collusive con-

trivance of his trial testimony are declared by the opinion to be insubstantial.

In response to the charge that the prosecution had suppressed evidence, the courts below find that as a matter of law petitioner has waived any rights he may have in this respect because Gold was not cross-examined and there was no demand for pre-trial statements. Government fraud cannot be so casually noted and disregarded.

22. The lower court erroneously assumed that the material presented by the petitioner represented the sum total to be offered at a hearing, and that since it was circumstantial rather than direct evidence, the matter could be disposed of *ex parte* without a hearing. The lower court was in error in deeming the reading of Gold's statements, which did not include statements made to the FBI, as equivalent to a hearing and that upon such reading it could make findings of fact. It compounded this error by holding in effect that the judgment of conviction, although obtained by prosecution fraud, the use of perjured testimony, or the suppression of evidence, was immune from collateral attack. The very nature and purpose of the writ would reject such a holding. The failure of trial counsel to cross-examine Gold was not an intentional relinquishment of a right to establish that the Government wrongfully suppressed evidence.

23. The facts upon which the allegations are based concerning the June 3rd meeting and card were first obtained by petitioner's counsel in the summer of 1965. These included the pre-trial statements of Harry Gold, a handwritten so-called "Chronology of Work for the Soviet Union" and various other documents, many of which were not included in the petition. The September 19, 1945 photostat of a purported original of a registration card was also made available to petitioner's counsel by Walter and Miriam Schneir at that same time. On this basis,

petitioner was enabled to further investigate the matter and obtain additional evidence in support of the petition.

24. The argument tendered by the government that the present application constitutes a misuse of the writ and that petitioner is barred by his prior 2255 motions is without merit. *Sanders* v. *United States*; *Price* v. *Johnston*; *Chessman* v. *Teets*, all *supra*.

In *Sanders* this court incorporated within Section 2255 the provision of Section 2244 that a hearing and relief would be denied only if the petition presents "no new grounds not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be satisfied by such inquiry." The facts tendered in the present petition have never been raised before, much of the evidence is recently obtained, the legal thrust and theory upon which the petition is premised, as intertwined with the new facts, is being raised for the first time and there has never been a hearing on the merits in any prior proceeding. The ends of justice can only be served by reaching the merits of the present application, and should doubts arise "they should be resolved in favor of the applicant."

The present application for relief is based upon evidence *dehors* the record; hence, as this Court stated in *Sanders* the "files and records of the case" cannot "conclusively show" that petitioner is entitled to no relief.

If the government wishes to resist the application on the claim that the issues could have or should have been raised before, the petitioner would be entitled to a hearing to present adequate reasons for not making the allegations earlier—this of itself becomes an issue of fact which must be resolved at a hearing. But as this court stated in *Price* v. *Johnston*:

> "And, if for some unjustifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary or reasonable to deny him the opportunity of obtaining judicial relief." (p. 291)

The nature of the application for relief and the facts upon which they are based, and the history of the prior post-trial proceedings, dispose of the Government's contentions in light of this Court's holdings. The ends of justice can only be served by affording petitioner the limited relief presently sought, an evidentiary hearing.

CONCLUSION

The petition for writ of certiorari should be granted. The order and judgment below should be reversed forthwith with instructions to grant a hearing on the petition.

Respectfully submitted,

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